(28,179)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 822.

JOHN C. HEALD, GEORGE E. HAMILTON, AND WILTON J. LAMBERT, COMMITTEE OF THE PERSON AND ESTATE OF EUGENE PETERS, PLAINTIFFS IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD et al., &c., Appellants,

vs.

DISTRICT OF COLUMBIA.

Supreme Court of the District of Columbia.

At Law. No. 61458.

JOHN C. HEALD, GEORGE E. HAMILTON, WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Plaintiffs,

vs.

DISTRICT OF COLUMBIA, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration.

Filed July 10, 1918.

In the Supreme Court of the District of Columbia.

At Law. No. 61458.

JOHN C. HEALD, GEORGE E. HAMILTON, WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Plaintiffs,

vs.

DISTRICT OF COLUMBIA, Defendant.

The plaintiffs sue the defendant for money payable by the defendant to the plaintiffs for goods sold and delivered by the
2 plaintiffs to the defendant; and for work done and materials provided by the plaintiffs for the defendant at its request; and for money lent by the plaintiffs to the defendant; and for money paid by the plaintiffs for the defendant at its request; and for money received by the defendant for the use of the plaintiffs; and for money found to be due from the defendant to the plaintiffs

on accounts stated between them. And the plaintiffs claim the sum of One thousand four hundred and seventy-eight dollars and twenty-six cents ($1,478.26) with interest thereon from the 29th day of May, 1918, according to the particulars of demand hereto annexed.

A. S. WORTHINGTON,
Attorney for Plaintiffs.

Particulars of Demand.

Filed July 10, 1918.

61458.

District of Columbia to John C. Heald, George E. Hamilton and Daniel W. Baker, Committee of the Person and Estate of Eugene Peters.

To amount paid by plaintiffs to the defendant under protest in writing on the 29th day of May, 1918, in satisfaction of an assessment against plaintiffs on account of certain intangible personal property held by plaintiffs on the 1st day of July, 1917..... $1,478.26

The basis of the claim of the plaintiffs that said assessment is illegal and void in whole and in its several parts appears from the Schedule of said intangible property which was filed by the plaintiffs with the Board of Assessors of the District of Columbia prior to the making of said assessment and the said protest in writing. A copy of said schedule is hereto appended marked Exhibit A and made part hereof, and a copy of said protest is hereto appended marked exhibit B and made part hereof.

A. S. WORTHINGTON,
Attorney for Plaintiffs.

Filed July 10, 1918. J. R. Young, Clerk.

Office of the Assessor of the District of Columbia.

July 1st, 1917.

This Statement Is Not Open to Public Inspection.

This schedule must be filled out, sworn to and presented to the Assessor or one of the members of the Board of Personal Tax Appraisers, at their office, District Building, on or before the 1st day of August, 1917.

3 On failure to deliver this schedule within the time specified, the Board of Personal Tax Appraisers shall make an assessment from the best information they can procure, to which they shall add a penalty of twenty per centum thereof.

Instructions as to Personal Estate.

* * * * * * *

20. On intangibles,—moneys and credits, including moneys loaned and invested, bonds and shares of stock. (For exceptions see instructions.) **(See item 21.)**

* * * * * * *

EXHIBIT A.

Perjury in this statement is punishable by imprisonment in the penitentiary for not less than two or more than ten years.

To the Board of Personal Tax Appraisers of the District of Columbia:

Schedule of all taxable personal property, under the laws of the District of Columbia for the year ending June 30, 1918, *of J. C. Heald, Geo. E. Hamilton & D. W. Baker, Committee of Eugene Peters.*

(Individual, company, corporation, executor, trustee, etc.)

Business or profession —.

Located at —.

Residence, c/o J. C. Heald, Colorado Bldg.

21—*Schedule of Intangible Personal Property.*

Taxable at three-tenths of one per centum based on fair cash value.

For instructions see pamphlet of requirements of the intangible personal property tax of the District of Columbia.

1. Moneys in Banks and Trust Companies, subject to check	$.....
2. Moneys in Banks, Trust Companies and Building Associations, not subject to check, in excess of $500	$ 5,846.89
3. Credits (including moneys loaned and invested)	$.....
4. Notes (certificates of indebtedness, temporary receipts)	$.....
5. Mortgages (deeds of trust, or loans secured on real estate)	$ 3,000.00

4 6. Stocks.	No. shares.	Par value.	Market value.
Calumet & Hecla Mining Company	103	25	54,899.00
Mergenthaler Linotype Company	206	100	30,024.50
Norfolk & Washington Steamboat Company	177	100	26,682.75
Pullman Company	653	100	91,746.50
Washington Railway and Electric Company	...	...	Exempt
Norris Peters Company	...	...	Exempt

Bonds.	At	Market value.
$17,000 Adams Express Company Coll. 4s 1948	70	11,900.00
$10,000 Ann Arbor R. R. Co. 4s 1995	61	6,100.00
$25,000 Atch. Top & Sante Fe R. Co. gen'l 4s 1995	89	22,250.00
$28,000 Atlantic Coast Line R. R. Co. consl. 4s 1952	87½	24,500.00
$25,000 Baltimore & Ohio R. R. Co. 1st 4s 1948	85½	21,375.00
$20,000 Baltimore & Ohio R. R. Co. P. L. E. & West Va. Div. 4s 1941	79	15,800.00
$14,500 Capital Traction Co. 1st 5s 1947	103	14,935.00
$10,000 Ches. & Ohio Rwy. Co. Gen'l 4½s 1992	83½	8,350.00
$14,000 Ches. & Pot. Tel. Co. Cons. 5s 1929	102	14,280.00
$10,000 Ch. Bur. & Quincy R. Co. Gen'l 4s 1958	89½	8,950.00
$4,000 Cin. Rich. & Ft. Wayne R. Co. 1st 7s 1921	102	4,080.00
$11,000 City & Suburban Rwy. Co. 1st 5s 1948	101½	11,165.00
$7,000 Clev. Cinn. Ch. & St. Louis R. Co. gen'l 4s 1993	67	4,690.00
$11,000 Hocking Valley R. Co. 1st Cons. 4½s 1999	83	9,130.00
$10,000 Lake Shore & Michigan Sou. R. Co. deb. 4s 1928	92⅝	9,262.50
$20,000 Louis. & Nash. R. Co. Unified 4s 1940	91⅜	18,275.00
$23,000 Norfolk & Western Ry. Co. 1st cons. 4s 1996	88	20,240.00
$300 Norfolk & Washington Steamboat Co. 1st 5s 1931	103	309.00
$20,000 Nor. Pac. & Gt. Nor. R. Co. C. B. & Q. Jt. 4s 1921	95⅝	19,125.00
$5,000 Potomac Electric Power Company, 1st 5s 1929	100½	5,025.00
$3,000 St. Paul & Nor. Pacific R. Co. 6s 1923	104⅞	3,146.25
$20,000 Southern Pacific R. Co. 1st ref'g 4s 1955	85½	17,100.00
$5,000 Virginia Midland R. Co. 1st 5s 1926	101¾	5,087.50
$7,000 Wash. Rwy. & Elec. Co. Cons. 4s 1951	78¼	5,477.50

5 *Affidavit.*

DISTRICT OF COLUMBIA, *ss:*

I solemnly swear that I have made, or caused to be made, a careful examination of all my tangible and intangible personal property, and that the foregoing is a full and true statement of the value of the same and of all taxable capital of every kind and description owned by (me) Eugene Peters and held by his Committee J. C. Heald, Geo. E. Hamilton & D. W. Baker, Committee of Eugene Peters subject to taxation under the laws of the District of Columbia, according to the instructions hereinbefore given, that the items thereof have been computed in the lawful money of the United States; that all the statements in connection therewith are full, true and correct, according to my best knowledge and belief; and that I have not temporarily transferred or otherwise disposed of any taxable property for the purpose of evading the payment of taxes thereon.

(Signed) JOHN C. HEALD,
GEORGE E. HAMILTON,
D. W. BAKER,
Committee of Eugene Peters, Colorado Building, Washington, D. C.

Subscribed and sworn to before me this 26th day of July, 1917.
WILLIAM K. QUINTER,
Notary Public, D. C. [SEAL.]

(Filed Under Protest—See Accompanying Letter.)

[Endorsed:] Name —. Address —. Amount taxable, $—. Entered, page —. (Leave Endorsement Blank to be Filled in Office.) Schedule of Personal Property for Fiscal Year 1917-1918. To be returned to the Assessor's Office on or before August 1, 1917. Paragraph 10, under caption, "Taxation of Personal Property," of Act of Congress approved July 1, 1902, directs the Collector of Taxes to distrain sufficient goods and chattels to discharge any delinquent personal tax and for want of such goods or chattels to levy upon and sell at auction the estate and interests of delinquents in any parcel of land in the District of Columbia.

EXHIBIT B.

May 29th, 1918.

To the Collector of Taxes of the District of Columbia, District Building, City.

SIR:

We enclose herewith our check as Committee of Eugene Peters, in your favor, for $1,490.26, being the amount of tax bill against
6 Mr. Peters, and his Committee, recently received from you, on account of tangible property $12.00, and on account of intangible personal property $1,478.26.

So far as relates to the $1,478.26 charged as taxes on intangible property we make this payment under protest and give notice that we shall bring suit against the District of Columbia, to recover it. The grounds of this protest are as follows:

1. Section 11 of the Act of Congress approved March 3rd, 1917, eititled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," under which section assessment in this District of intangible personal property for purposes of taxation has been attempted, is wholly void for the following, among other reasons:

a. Taken as a whole by no reasonable interpretation can it be determined with sufficient certainty what intangible personal property it is proposed to have taxed under it.

b. It undertakes to authorize an assessment of intangible personal property of any person or corporation doing business in the District of Columbia, even though he may reside elsewhere and be so taxed at his place of residence, and it is impossible to determine whether Congress intended the section in question to be enforced with this provision eliminated as to non-residents.

c. It is against natural justice, in that it undertakes to tax certain classes of persons and exempt other classes from such taxation, without any legal or reasonable grounds for such discrimination.

d. It provides that there shall be exempt "shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege"—a provision so vague that it is impossible to determine with any reasonable degree of certainty what classes of corporate stock are to be taxed and what exempted, and it is impossible to determine whether Congress intended the section in question to be enforced with this provision eliminated.

2. There is nothing in said Section 11 of said Act which authorizes the taxation of intangible personal property represented by shares of stock in corporations, the tax authorized thereby being taxation only on "moneys and credits."

3. Included in the schedule which we have submitted as the Committee of Eugene Peters, under appointment of the Supreme Court of the District of Columbia, and upon which it is attempted to base the tax which we are disputing are shares of stock in a number of business corporations which by reason of or in addition to incorporation receive no special franchise or privilege.

Very respectfully,

J. C. HEALD,
GEORGE E. HAMILTON,
D. W. BAKER,
Committee of Eugene Peters.

7 *Motion to Dismiss.*

Filed August 5, 1918.

* * * * * * *

Now comes the defendant, the District of Columbia, by its counsel, and moves the Court to dismiss the plaintiff's declaration for that:

1. The assessment complained of in the said declaration is a just and legal assessment.

2. The stocks and bonds listed in the bill of particulars attached to the said declaration, the assessment of which is complained of in the said declaration, were justly and legally assessed under the law.

3. There is nothing set forth in the said declaration to entitle the plaintiffs to recover the sum claimed therein.

4. The Act under which the said tax was imposed is constitutional and valid in whole and in all its parts.

C. H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Defendant.

Memorandum.

April 25, 1919.—Suggestion of death of D. W. Baker and appointment of W. J. Lambert as one of said Committee and appearance of V. E. West for plaintiffs.

Wilton J. Lambert substituted as one of Committee.

Supreme Court of the District of Columbia.

Thursday, June 12, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * * * *

No. 61,458. At Law.

JOHN C. HEALD, GEORGE E. HAMILTON and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Plaintiffs,

vs.

DISTRICT OF COLUMBIA, Defendant.

Come now the parties hereto by their respective attorneys of record; whereupon, defendant's motion to dismiss plaintiff's
8 declaration having been considered by the Court, it is ordered that said motion be, and the same is hereby granted. Thereupon plaintiffs by their said attorney state to the Court that they do not desire to amend and elect to stand upon the declaration. Wherefore, it is considered that the plaintiffs take nothing by this action, that the defendant go hence without day, be for nothing held, and recover of the plaintiffs its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the plaintiffs by their said attorney, in open court, note an appeal to the Court of Appeals; whereupon, the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit the sum of Fifty Dollars ($50.00) with the clerk, in lieu thereof.

Memorandum.

July 3, 1919:—$50 deposited in lieu of bond on appeal.

Assignment of Errors.

Filed August 1, 1919.

* * * * * * *

The Court erred—

1. In sustaining the defendant's motion to dismiss the declaration and entering judgment against the plaintiffs.

2. In not holding that Section 6 of the Act of Congress of July 1, 1902, entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," as amended by the Act of Congress approved March 3, 1917, (39 Stats. L., 1004, 1046), is wholly void.

3. In not holding that so much of Section 6, as so amended, which provides that the same shall not apply "to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting busi-

ness in similar lines are rated, assessed, and taxed," is void, because the meaning of said provision is so uncertain that it is impossible to determine with any certainty what is meant by the words in said provision "special franchise or privilege."

4. In not holding that the question whether the stocks held by the plaintiffs in the several corporations mentioned in the record are taxable under said Section 6, as so amended, is one that can
9 be determined only at the trial of the case, and that is not capable of determination in advance of the trial.

A. S. WORTHINGTON,
VERNON E. WEST,
Attorneys for Plaintiffs.

Designation of Record.

Filed August 11, 1919.

* * * * * * *

The Clerk will please prepare a record for transcript on appeal in the above entitled cause and include therein the following:

Declaration, particulars of demand, so much of Exhibit A thereto as is not included within brackets, and Exhibit B thereto, filed July 10, 1918.

Motion to dismiss the declaration filed August 5, 1918.

Memorandum of suggestion of death of D. W. Baker and appointment of Wilton J. Lambert as one of said Committee, and substitution of said Lambert as one of the parties plaintiff of April 25, 1919.

Judgment and appeal of June 12, 1919.

Memorandum of deposit of $50.00 in lieu of appeal bond, of July 3, 1919.

Assignment of errors.

This designation.

A. S. WORTHINGTON,
VERNON E. WEST,
Attorneys for Plaintiffs.

I consent to the above designation of record.

C. H. SYME,
F. H. S.,
F. H. STEPHENS,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record,

according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 61,458 at Law, wherein John C. Heald, et al*d*. are Plaintiffs and District of Columbia is Defendant, as the same remains upon the files and of record in said Court.

10 In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of August, 1919.

[Seal of the Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3307. John C. Heald et al., &c., appellants, vs. District of Columbia. Court of Appeals, District of Columbia. Filed Aug. 18, 1919. Henry W. Hodges, clerk.

11 Monday, January 5th, A. D. 1920.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellant-,

vs.

DISTRICT OF COLUMBIA.

The argument in the above entitled cause was commenced by Mr. Vernon E. West, attorney for the appellants, and was continued by Mr. F. H. Stephens, attorney for the appellee, and was concluded by Mr. A. S. Worthington, attorney for the appellants.

12 In the Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, & WILTON J. LAMBERT, Committee of the Person & Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA, Appellee.

Memorandum of Recent Cases in the Supreme Court of the United States upon the Question Whether the Plaintiff is Entitled to Raise the Questions Discussed in His Brief, Such Questions Having Been Raised to Test the Constitutionality of the Law, but the Validity of the Tax as Applied to the Plaintiff in Error Himself Not Being Open to Question.

At the oral argument in the Supreme Court certain questions came from the Bench, addressed to counsel for the petitioner, as to whether he was in a position to raise the questions as to the illegality of the tax on non-residents, taxation of State and municipal bonds, etc., there being no dispute that the petitioner himself was a resident and clearly liable to be taxed and upon the securities taxed. Counsel responded to these inquiries by citing the Employers' Liability Cases. The rejoinder to this from the Bench was that recent cases in that court held that the person complaining must show that his rights were being violated—that he was in the class discriminated against. These cases are,—

Plymouth Coal Co. v. Pennsylvania, 232 U. S., 544, 545, was an attack upon the constitutionality of the law of Pennsylvania requiring pillars of coal to be left between adjoining *lines* in
13 case either should be abandoned and filled with water. The court said:

"We may once more repeat, what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution. Southern Railway Co. v. King, 217 U. S. 524, 534; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550; Rosenthal v. New York, 226 U. S. 260, 271.

"It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. Lieberman v. Van De Carr, 199 U. S. 552, 562; Bradley v. Richmond, 227 U. S. 477, 483."

Jeffrey Manufacturing Company v. Blagg, 235 U. S. 571, 576, was an attack upon the Workmen's Compensation Act of Ohio. The court said in that case,—

"For it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. Southern Railway v. King, 217 U. S. 524, 534; Engel v. O'Malley, 219 U. S. 128, 135; Standard Stock Food Co. v. Wright, 225 U. S. 540, 550; Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co., 226 U. S. 217, 219; Rosenthal v. New York, 226 U. S. 260, 271; Darnell v. Indiana, 226 U. S. 390, 398; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Missouri, Kansas & Texas Ry. v. Cade, 233 U. S. 642, 648."

Mallinckrodt Works v. St. Louis, 238 U. S. 41, 54, was an attack upon the constitutionality of the statute of Missouri requiring corporations to file annually an affidavit of non-participation in trusts and combinations. The court said,—

14 "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconsitutional, and that the alleged unconstitutional feature injures him. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544, and cases cited.

"And it is to be assumed, in the absence of any construction of the statute by the courts of the State, that those courts will adopt such a construction as will render the enactment consistent with constitutional limitations. Bachtel v. Wilson, 204 U. S. 36, 40."

Thomas Cusack Company v. City of Chicago et al., 242 U. S. 526, 530, the question was raised of the validity of an ordinance of the city relating to bill posting. The court said,—

"He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. Tyler v. Judges of Registration, 179 U. S. 405; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.

Arkadelphia Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134, 149, was brought to test the validity of interstate freight and passenger rates prescribed by the State Railroad Commissioners of Arkansas. The court said,—

"It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576; Mallinckrodt Works v. St. Louis, 238 U. S. 41, 54; Cusack Co. v. Chicago, 242 U. S. 526, 530.

"Lake Shore & Michigan Southern Ry. Co. v. Smith, 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503, 511; Pennsylvania R. R. Co. v. Towers, 245 U. S. 6."

See also District of Columbia v. Brooke, 214 U. S. 138, 152.

15 The Employers' Liability Cases, 207 U. S. 463, relied on by the appellants to sustain their right to attack the validity of this statute, it will be recalled, was an attack made by a carrier which was engaged in both intra-state and inter-state commerce and, therefore, entitled to raise questions pertaining to those operations. It should not be forgotten, also, that four members of the court dissented from the construction of the statute that made it invalid.

Respectfully submitted,

F. H. STEPHENS,
Corporation Counsel, D. C.

[Endorsed:] 3307. Heald et al., v. D. C. Memo. for Appellee. Copy. Court of Appeals, District of Columbia. Filed Nov. 11, 1920. Henry W. Hodges, clerk.

16 In the Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA, Appellee.

Appellants' Memorandum in Reply to Appellee's Memorandum of Recent Cases.

Counsel for appellee, in his memorandum of recent cases filed herein, makes the erroneous statement that the validity of the tax as applied to appellants is not open to question. There are certain questions involved herein which directly affect appellants—the impossibility of enforcing the act because of the uncertainty of the clause relating to companies receiving no special franchise or privilege; the right of Congress to levy a tax upon the inhabitants of the District at all, and the right of Congress to levy a tax upon the inhabitants of the District, the proceeds of which are to go into the Treasury of the United States to be used for the general purposes of Government.

During the argument of this case before the Supreme Court of the United States, no statement was made from the bench that no person

could assail the validity of a statute unless he came within the class discriminated against. Mr. Justice Holmes called the attention of counsel for appellants here to recent decisions in that court, without naming them, involving this question, and asked counsel if he was familiar with them, to which the reply was made that they were all appeals involving the constitutionality of State statutes and came within the reasoning of that court in the case of Hatch vs. Reardon, 204 U. S., 152, (quoted in petitioners' brief filed in the Supreme Court) wherein it was held that in such cases that court had nothing before it but the question of constitutionality, and that it was
17 necessary that the person complaining come within the class discriminated against, since the power to construe was vested solely in the State court, and it was impossible to say what limitations, under State rules of construction, might be read into the statute, or to what extent the valid portion might be separated from the invalid. All of the cases cited by counsel for appellee, with the exception of one (District of Columbia vs. Brooke, 214 U. S., 138) involve State statutes.

We will now consider the cases relied upon in the memorandum of recent cases submitted by counsel for appellee.

In Plymouth Coal Co. vs. Pennsylvania, 232 U. S., 531, the court, recognizing the power of construction in the State court, said:

"That being so, it is not incumbent upon us to construe the statute in this regard; but rather, to say merely whether the section admits of any reasonable construction that will sustain its constitutionality.

"For in cases other than such as arise under the contract clause of the Consitution, it is the appropriate function of the court of last resort of a State to determine the meaning of local statutes. And in exercising the jurisdiction conferred by sec. 237, Judicial Code, it is proper for this court rather to wait until the state court has adopted a construction of the statute under attack than to assume in advance that a construction will be adopted such as to render the law obnoxious to the Federal Constitution. Bachtel v. Wilson, 204 U. S., 36, 40; Adams v. Russell, 229 U. S., 353, 360."

In Jeffrey Manufacturing Co. vs. Blagg, 235 U. S., 571, the Supreme Court expressly stated that "it only hears objections" from those discriminated against. That that court did not intend to announce a rule for other courts is apparent, since it cited in support of its holding Yazoo vs. Jackson Vinegar Co., 226 U. S., 217, where the court said:

"It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now."

In Mallinckrodt vs. St. Louis, 238 U. S., 41, the language quoted by counsel for appellee sufficiently shows that the Supreme Court re-

garded the question of construction as one for the State court.

18 The case of Cusack Co. vs. Chicago, 242 U. S., 526, is not in point. There the court had under consideration an ordinance prohibiting the erection of billboards, unless the consent of the property owners in the neighborhood was obtained. After upholding the power of the city to prohibit billboards absolutely, the court held that the permission to erect billboards under such circumstances could not invalidate the ordinance.

The case of Arkadelphia Co. vs. St. Louis S. W. Ry. Co., 249 U. S., 134, cites the cases previously considered, and comes within the same principle.

In District of Columbia vs. Brooke, 214 U. S., 138, the question involved was the validity of an act of Congress relating to the District of Columbia, providing that property owners should connect their lots with sewers and water mains. The objections to the act which the court refused to consider were matters going, not to the validity of the statute, but to difficulties of enforcement in certain cases.

Thus, it will be seen that the Supreme Court has never held that this Court or a State court must refuse to declare a statute void, merely because the person raising the question does not come within the class discriminated against. It has simply held that it will not do so, in the case of State statutes, if there is any reasonable rule of construction by which the State court can uphold the law. But if it is apparent that it connot be sustained by a reasonable rule of construction, or if the statute involved is an act of Congress, the Supreme Court will not hesitate to declare the law unconstitutional in a proper case, even upon the complaint of one not coming within the class discriminated against. The cases on this point are cited on pages 17 to 21 of our brief filed in the Supreme Court of the United States.

Respectfully submitted,

A. S. WORTHINGTON,
VERNON E. WEST,
Attorneys for Appellants.

19 Endorsed: No. 3307. John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, Appellants, vs. District of Columbia. Appellants' Memorandum in Reply to Appellee's Memorandum of Recent Cases. Court of Appeals, District of Columbia. Filed November 15, 1920. Henry W. Hodges, Clerk.

20 Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

v.

DISTRICT OF COLUMBIA, Appellee.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a judgment in the Supreme Court of the District sustaining a demurrer to the declaration, in which the plaintiffs, appellants here, residents of the District, sought the repayment of a tax levied on certain intangible personal property held by them as committee of the person and estate of Eugene Peters, also a resident of the District, the contention of plaintiffs being (*a*) that the act under which the tax was levied is unconstitutional and wholly void, and (*b*) that the question whether the stocks, held by them in the several corporations named in their return to the District Assessors, are taxable, can only be determined at a trial of the case.

Section 9 of the District of Columbia Appropriation Act of March 3, 1917, 39 Stat., 1004, 1046, amends Section 6 of the District Appropriation Act of July 1, 1902, 32 Stat., 590, 617, by adding, after paragraph 2, the following provisions: "The moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph 1 of said section 6 for listing and appraisal of trangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District three-tenths of 1 per centum of the value thereof." Then follows an exemption of certain deposits of individuals not in excess of $500 in banks, trust companies or building associations. A further provision exempts

21 bank notes or notes discounted by any bank or banking institution, savings institution or trust company, savings institutions having no capital stock, building associations, firms, relief associations, secret and beneficial societies, labor unions, labor-union relief associations, beneficial organizations paying sick or death benefits from funds received from voluntary contributions or assessments, and life or fire insurance companies having no capital stock. It is then provided that the tax shall not apply "to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such cor-

porations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed."

Appellants base their contention that the act is unconstitutional upon the ground, first, that it provides for the taxation of property situated outside the District, and, second, that the exemption list quoted is incapable of intelligent definition. While it appears, from appellants' brief, that the District authorities have construed the act as only authorizing the taxation of property within the District, thus following an established principle of construction (Employers' Liability Cases, 207 U. S., 463; Petri v. Commercial Bank, 142 U. S., 644), our first inquiry properly is whether appellants have brought themselves within the class as to which the act, if given one interpretation, is void. They are residents of the District and the property taxed is within the District, and hence clearly subject to the provisions of this law. Should it ultimately be determined that Congress, disregarding the authoritative rulings of the Supreme Court of the United States, intended in this act to tax here property located elsewhere, it by no means would follow that as to persons and property clearly subject to taxation here the act would be void. El Paso v. Gutierrez, 215 U. S., 87. Therefore the failure of appellants to bring themselves within the class as to which, under their contention, the act is void, deprives them of the right to maintain this suit. We shall do no more than cite the cases which, in our view, sustain our position. Plymouth Coal Co. v. Pennsylvania, 232 U. S., 544, 545; Jeffry Mfg. Co. v. Blagg, 235 U. S., 571, 576; Arkadelphia Co. v. S. W. Ry. Co., 249 U. S., 134, 149.

Appellants have alleged no facts that would bring the shares of stock held by them within the exception relative to stock of business companies, which by reason of or in addition to incorporation receive no special franchise or privilege, and we therefore do not discuss that phase of the case.

The judgment must be affirmed with costs.

Affirmed.

22 January Term, 1921.

No. 3307.

Monday, January 3rd, A. D. 1921.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and

adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ROBB,

January 3, 1921.

23 Monday, January 17th, A. D. 1921.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA.

On motion of Mr. Vernon E. West, of counsel for the appellants, it is ordered by the court that a writ of error to remove the above entitled cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, Appellants, and District of Columbia, Appellee, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Cout of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of March, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

C. J. SMYTH,
Chief Justice Court of Appeals
of the District of Columbia.

25 (*Bond on Writ of Error.*)

Know all men by these presents, that we, John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, as principals, and United States Fidelity and Guaranty Company, a corporation of the State of Maryland, as surety, are held and firmly bound unto District of Columbia, in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said District of Columbia, or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this day of February in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between said John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, and said District of Columbia, a judgment was rendered against the said John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, and the said John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, having obtained a writ of error and filed a copy thereof in the Clerk's Office of said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters shall prosecute said writ of error to effect, and answer all costs if they fail to make

their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN C. HEALD. [SEAL.]
GEORGE E. HAMILTON. [SEAL.]
WILTON J. LAMBERT. [SEAL.]

[Seal of United States Fidelity and Guaranty Company.]

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By LEE B. MOSHER, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of—

L. L. PERKINS.

Approved by—

C. J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] 3307. John C. Heald et al., appellants, vs. District of Columbia. Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed March 23, 1921. Henry W. Hodges, clerk.

26 UNITED STATES OF AMERICA, *ss.*:

To District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein John C. Heald, George E. Hamilton and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Justice of the Court of Appeals of the District of Columbia, this 23rd day of March, in the year of our Lord one thousand nine hundred and twenty-one.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 23rd day of March, A. D. 1921.

F. H. STEPHENS,
Corporation Counsel, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 23, 1921. Henry W. Hodges, clerk.

27 In the Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA, Appellee.

Assignments of Error.

The Court erred—

1. In affirming the judgment of the Supreme Court of the District of Columbia.

2. In holding that plaintiffs in error are not in a position to question the validity of Section 6 of the Act of Congress of July 1, 1902, entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," as amended by the Act of Congress approved March 3, 1917, (39 Stat. L., 1004, 1046,) which reads as follows:

"Sec. 9. That section eleven of the act entitled 'An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved September first, nineteen hundred and sixteen, be amended so that the same shall read as follows:

"'Sec. 11. Section six of the act of July first, nineteen hundred and two, entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," is hereby amended by adding, after paragraph two of said section:

28 "'"That the moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is hereby provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph one of said section six for listing and appraisal of tangible personal property and assessed at their fair

cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District three-tenths of one percentum of the value thereof: Provided, That savings deposits of individuals in a sum not in excess of $500 deposited in banks, trust companies, or building associations, subject to notice of withdrawal and not subject to check, shall be exempt from this tax: Provided, further, That such tax on moneys and credits shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution, or trust company, nor to savings institutions having no capital stock, building associations, firemen's relief associations, secret and beneficial societies, labor unions, and labor union relief associations, nor to beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions; nor shall the provisions of this act apply to life or fire insurance companies having no capital stock, nor to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed: And provided further, That corporations, limited partnerships, and joint-stock associations within said District liable to tax under the laws of said District on earnings or capital stock shall not be required to make any report or pay any further tax under this section on the mortgages, bonds, and other securities owned by them in their own right, but such corporations, partnerships, and associations holding such securities as trustees, executors, administrators, guardians, or in any other manner shall return and pay the tax imposed by this section upon all securities so held by them as in the case of individuals." ' "

3. In not holding that said section 6, as so amended, is wholly void.

4. In not holding that that part of said section 6, as so amended, which provides that the same shall not apply "to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed," is void, because the meaning of said provision is so uncertain that it is impossible to determine with any certainty what is meant by the words "special franchise or privilege."

29

5. In not holding that, even if the clause of the statute quoted in the next preceding assignment of error is sufficiently definite to be capable of enforcement, the question whether the shares of stock in corporations held by the plaintiffs in error are taxable can be judicially determined only at the trial.

VERNON E. WEST.
A. S. WORTHINGTON.
W.,
Attorneys for Plaintiffs in Error.

30 [Endorsed:] No. 3307. John C. Heald, George E. Hamilton, and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, appellants, vs. District of Columbia, appellee. Assignments of error. Court of Appeals, District of Columbia. Filed Mar. 24, 1921. Henry W. Hodges, clerk.

31 In the Court of Appeals of the District of Columbia.

No. 3307.

JOHN C. HEALD, GEORGE E. HAMILTON, and WILTON J. LAMBERT, Committee of the Person and Estate of Eugene Peters, Appellants,

vs.

DISTRICT OF COLUMBIA, Appellee.

Designation of Record.

The appellants, plaintiffs in error, designate the following to constitute the record on their writ of error:

1. Transcript of record.
2. Argument of cause.
3. Memorandum of authorities for appellee, filed November 11, 1920.
4. Appellants' memorandum, filed November 15, 1920, in reply to appellee's memorandum.
5. Opinion of Court.
6. Judgment.
7. Order allowing writ of error.
8. Bond on writ of error.
9. Writ of error.
10. Citation, with acceptance of service.
11. Assignments of error.
12. This designation.

VERNON E. WEST,
A. S. WORTHINGTON,
W.,
Attorneys for Plaintiffs in Error.

[Endorsed:] No. 3307. John C. Heald, George E. Hamilton, and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, appellants, vs. District of Columbia, appellee. Designation of record. Court of Appeals, District of Columbia. Filed Mar. 24, 1921. Henry W. Hodges, clerk.

32 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 31 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals, as designated by counsel in the case of John C. Heald, George E. Hamilton, and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, Appellants, vs. District of Columbia, No. 3307, January Term, 1921, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 25th day of March, A. D. 1921.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,179. District of Columbia Court of Appeals. Term No. 822. John C. Heald, George E. Hamilton, and Wilton J. Lambert, committee of the person and estate of Eugene Peters, plaintiffs in error, vs. The District of Columbia. Filed March 26th, 1921. File No. 28,179.

NOV 15 1921
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 269.

AUGUSTUS S. WORTHINGTON AND JOHN C. HEALD, EXECUTORS OF THE WILL OF EUGENE PETERS, DECEASED, PLAINTIFFS IN ERROR,

vs.

DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

VERNON E. WEST,
A. S. WORTHINGTON,
Attorneys for Plaintiffs in Error.

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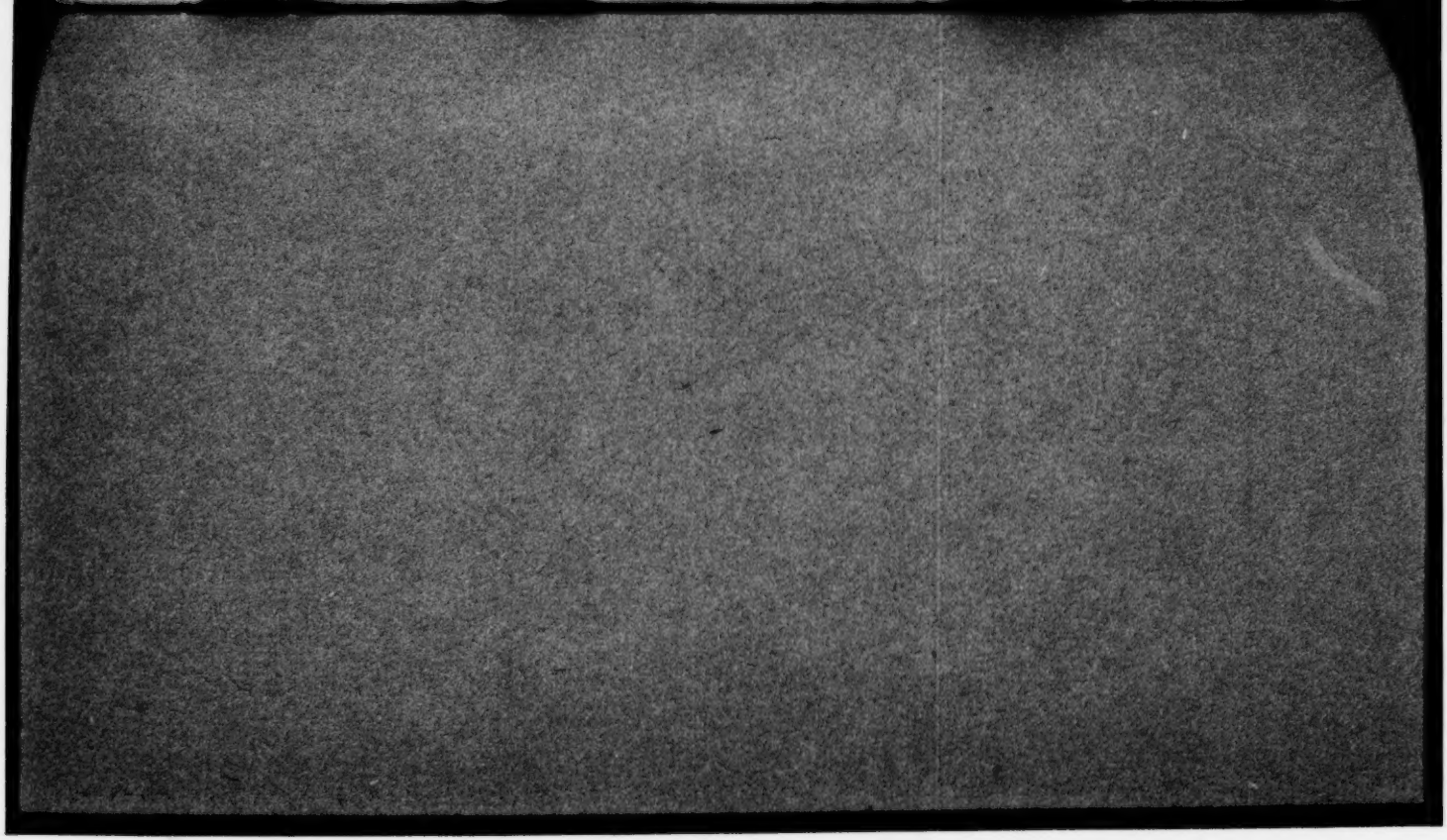

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 268.

AUGUSTUS S. WORTHINGTON AND JOHN C. HEALD, EXECUTORS OF THE WILL OF EUGENE PETERS, DECEASED, PLAINTIFFS IN ERROR,

vs.

DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This case was here before on a certificate from the Court of Appeals of the District of Columbia, and involves the construction and validity of section 9, of the District Appropriation Bill, approved March 3, 1917 (39 Stats. L., 1004, 1046). That section, which is set forth in full in the assignments of error, we shall refer to in this brief as the act of 1917.

John C. Heald, George E. Hamilton, and Wilton J. Lambert, Committee of the Person and Estate of Eugene Peters, a lunatic, under the requirements of

the said act, paid to the collector of taxes of the District of Columbia, $1,478.26, being the tax upon certain intangible property which is described on pages 3 and 4 of the record. They accompanied this payment with a protest, which appears on pages 5 and 6 of the record.

This suit was brought in the Supreme Court of the District of Columbia to recover from the District the amount so paid, the declaration containing merely the common counts, but being supported by a bill of particulars setting forth the nature of the claim (Rec., pp. 1 to 4).

The defendant filed a motion to dismiss the suit (Rec., p. 7), a motion equivalent under the rules of the court to a demurrer to the declaration. The general ground of the motion was that plaintiffs had not set forth a legal cause of action.

After full argument, in which it was conceded that the members of the committee and their ward were residents of the District of Columbia, and after several months' delay, the court sustained the motion (Rec., p. 8), without giving any opinion orally or in writing.

From the order of dismissal an appeal was taken to the Court of Appeals of the District. The case having been argued there, that court certified to this court the following questions, involving a decision of the case on its merits:

> "1. Does section 9 of an act of Congress approved March 3, 1917 (39 Stats. L., 1004, 1046), under which said assessment was made, require that moneys and credits, including moneys loaned and invested, bonds and shares of stock . . . of any person, firm, association, or corporation . . . engaged in business within said District, but residing outside of said District, shall be assessed by the District of Columbia for the purpose of taxation.

"2. If it does, is it invalid? And if invalid, does that fact render void the entire section?

"3. Does the section require the District of Columbia to assess the bonds and other securities of the States and their municipal corporations held by residents of the District of Columbia; and if it does, does its invalidity on that account render the entire section void?"

After argument in this court on the above questions, this court, of its own motion, dismissed the certificate for want of jurisdiction, on the ground "that the court below had no power to certify questions to this court where its judgment or decree would be susceptible of review in this court on error or appeal." Heald, et al., *vs.* District of Columbia, 254 U. S., 20.

The case was then again submitted to the Court of Appeals on new briefs as well as on the old ones. That court thereupon rendered an opinion (Rec., pp. 16 and 17) sustaining the lower court, and holding that it was unnecessary to consider the case on its merits, because Peters and his committee, being residents of the District, were not in a position to challenge the validity of the act on the ground that it unlawfully taxed nonresidents, and also because "appellants have alleged no facts that would bring the shares of stock held by them within the exception relative to stock of business companies, which by reason of or in addition to incorporation receive no special franchise or privilege." The court below, however, ignored the other questions involved—the invalidity of the act because it attempts to tax municipal and state bonds (one of the questions previously certified to this court); the power of Congress to levy a tax upon the District, the proceeds of which go into the Treasury of the United States to be used for the general purposes of Government and the power of Congress to levy a tax on the District when the

inhabitants thereof are not represented in that body.

From the judgment of that court, this case was brought here on writ of error. Thereafter, Eugene Peters died, leaving a last will and testament, made while still sane, naming Augustus S. Worthington and John C. Heald as the executors thereof. The executors have been substituted as plaintiffs in error in the place and stead of the former committee.

Assignments of Error.

The court erred:

1. In affirming the judgment of the Supreme Court of the District of Columbia.

2. In holding that plaintiffs in error are not in a position to question the validity of Section 6 of the Act of Congress of July 1, 1902, entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," as amended by the Act of Congress approved March 3, 1917 (39 Stats. L., 1004, 1046), which reads as follows:

> "Sec. 9. That section eleven of the act entitled' 'An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved September first, nineteen hundred and sixteen, be amended so that the same shall read as follows:
>
> "'Sec. 11. Section six of the act of July first, nineteen hundred and two, entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," is hereby amended by adding, after paragraph two of said section:

" ' "That the moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is hereby provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph one of said section six for listing and appraisal of tangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District three-tenths of one per centum of the value thereof: *Provided*, That savings deposits of individuals in a sum not in excess of $500 deposited in banks, trust companies, or building associations, subject to notice of withdrawal and not subject to check, shall be exempt from this tax: *Provided, further*, That such tax on moneys and credits shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution, or trust company, nor to savings institutions having no capital stock, building associations, firemen's relief associations, secret and beneficial societies, labor unions, and labor union relief associations, nor to beneficial organizations paying sick or death benefits or either or both, from funds received from voluntary contributions or assessments upon members of such associations societies or unions; nor shall the provisions of this act apply to life or fire insurance companies having no capital stock, nor to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed: *And provided further*, That corporations, limited partnerships, and joint-stock associations within

said District liable to tax under the laws of said District on earnings or capital stock shall not be required to make any report or pay any further tax under this section on the mortgages, bonds, and other securities owned by them in their own right, but such corporations, partnerships, and associations holding such securities as trustees, executors, administrators, guardians, or in any other manner shall return and pay the tax imposed by this section upon all securities so held by them as in the case of individuals.'' ''

3. In not holding that section 6, as so amended, is wholly void.

4. In not holding that that part of said section 6, as so amended, which provides that the same shall not apply "to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed," is void, because the meaning of said provision is so uncertain that it is impossible to determine with any certainty what is meant by the words "special franchise or privilege."

5. In not holding that, even if the clause of the statute quoted in the next preceding assignment of error is sufficiently definite to be capable of enforcement, the question whether the shares of stock in corporations held by the plaintiffs in error are taxable can be judicially determined only at the trial.

6. In not holding that said section 6, as so amended, is void because Congress is without power to tax the inhabitants of the District, since they are not represented in the taxing body.

7. In not holding that, even if Congress has general power to tax the inhabitants of the District, said section 6, as so amended, is nevertheless invalid, because under

that and other acts of Congress money collected by the tax imposed by said section 6, as so amended, is required to be paid into the Treasury of the United States to be applied to the payment of the general expenses of the United States; whereas Congress, if it has the power of taxation in the District of Columbia under present circumstances, can do so only for the purpose of raising funds to be applied to the expenses of the District itself.

ARGUMENT.

I.

The Whole Act Being Void, Plaintiffs in Error May Question Its Validity.

Taking up first the right of plaintiffs in error to question the validity of the act because it unlawfully taxes non-residents, if, as we respectfully submit, this renders the entire act void, there is left no authority for the taxation of plaintiffs in error thereunder, and they are prejudiced by its attempted enforcement. It would be most remarkable if plaintiffs in error and others in a similar position must continue to pay taxes under a void statute until the question of its invalidity is raised by a non-resident. If this were the law the Commissioners of the District could, as they have attempted to do, read into the act limitations not there and enforce it only to the extent of the power of Congress, thus preventing its validity from being questioned, and, in effect, rendering valid that which is invalid. The power of amendment is vested alone in Congress, and not in the courts or the District Commissioners.

Congress clearly intended that the act should operate alike upon residents and non-residents engaged in business here. If the act is to be narrowed by executive

amendment to its constitutional limits, and so enforced, there will be one rule of taxation for residents and another for non-residents. Practically the whole burden of the tax will be thus thrown upon residents to their detriment and to the advantage of non-residents competing with them. Who can say that Congress would have passed the act in the form as now enforced by the District authorities? Must the resident continue forever to pay the tax levied under a void statute, simply because the District Commissioners see fit to collect the tax from residents alone, when the statute in plain terms directs the same tax be collected from non-residents engaged in business here? This is the effect of the decision of the court below, since it permits only non-residents to attack the act on the ground here under consideration.

The court below, in its opinion, relied upon the decisions of this court in the cases of Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 544; Jeffry Mfg. Co. *vs.* Blagg, 235 U. S., 571, and Arkadelphia Co. *vs.* S. W. Ry. Co., 249 U. S., 134. But each of those cases relates to the constitutionality of State statutes. This court had before it only the question of constitutionality, and not the question of construction. It was not incumbent upon this court to determine whether the whole act must fall if part was void; provided, there was any possible legal construction by which the State court could separate the good from the bad.

The reason for the rule applied by this court in regard to State statutes is fully set forth in Hatch *vs.* Reardon, 204 U. S., 152, 160, as follows:

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the *tax laws of a State* on constitutional grounds. This limit has been fixed in many cases. It is that unless the party

setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. Supervisors *vs.* Stanley, 105 U. S., 305, 311; Clark *vs.* Kansas City, 176 U. S., 114, 118; Lampasas *vs.* Bell, 180 U. S., 276, 283, 284; Cronin *vs.* Adams, 192 U. S., 108, 114. If the law is valid when confined to the class of the party before the court, *it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails.* With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. See *e. g.* People's National Bank *vs.* Marye, 191 U. S., 272, 283." (Italics ours.)

The cases relied upon by the lower court are to the same effect. In the Plymouth Coal Co. case, this court said:

"That being so, it is not incumbent upon us to construe the statute in this regard; but rather to say merely whether the section admits of any reasonable construction that will sustain its constitutionality.

"For in cases other than such as arise under the contract clause of the Constitution, it is the appropriate function of the court of last resort of a State to determine the meaning of local statutes. And in exercising the jurisdiction conferred by sec. 237, Judicial Code, it is proper for this court rather to wait until the State court has adopted a construction of the statute under attack than to assume in advance that a con-

> struction will be adopted such as to render the law obnoxious to the Federal Constitution. Bachtel *vs.* Wilson, 204 U. S., 36, 40; Adams *vs.* Russell, 229 U. S., 353, 360."

In the Jeffry Mfg. Co. case, this court did say broadly that "it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of," but it is apparent that it was not intended to lay down a new rule, inasmuch as every case cited, with the exception of Engel *vs.* O'Malley, 219 U. S., 128, in turn cited Hatch *vs.* Reardon. The Engel case cited Southern Railway *vs.* King, 217 U. S., 524, which also relied upon the Hatch case.

In the case of Yazoo *vs.* Jackson Vinegar Co., 226 U. S., 217, cited in the Jeffry Mfg. Co. case, this court reiterated the reason of the rule under discussion, as follows:

> "It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now."

And in the Arkadelphia case, the last of the cases relied upon by the court below, it was said:

> "It is most thoroughly established that before one may be heard to strike down *State* legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature." (Italics ours.)

It will thus be seen that the above decisions are all limited to the jurisdiction of this court upon appeals

involving the constitutionality of State statutes, where by some legal rule of construction the valid portion of the act might be separated from that which is void—a question solely for the State courts. But if it is apparent that the good can not be separated from the bad by any legal rule of construction, this court will not hesitate to declare the whole act void.

In the case of Bowman *vs.* Continental Oil Co., decided by this court on June 6, 1921, there was involved the question of the validity of a statute of New Mexico "providing for an excise tax upon the sale or use of gasoline and for a license tax to be paid by distributors and retail dealers therein." The license feature of the law was attacked on the ground that it imposed the tax upon distributors engaged in interstate, as well as intrastate business, the oil company being engaged in both. The executive and administrative officers of the State disavowed any attempt to enforce the act beyond constitutional limits, and sought to have it sustained only in so far as intrastate commerce was concerned. In an opinion directing the court below "to grant a decree enjoining the enforcement, as against plaintiff, of the license tax without qualification," this court said:

> "Upon the question of severability, we are constrained to concur in the view adopted by the district court; and this notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the Federal Constitution. Ohio Tax Cases, 232 U. S., 576, 591; St. Louis Southwestern R. Co. *vs.* Arkansas, 235 U. S., 350, 369, 370. The act, in its second section, requires every distributor of gasoline to pay an annual tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it. Section 8 declares that any person who

shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect of this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt. United States *vs.* Reese, 92 U. S., 214, 221; Trade-Mark Cases, 100 U. S., 82, 99; Poindexter *vs.* Greenhow, 114 U. S., 270, 304, 305; Pollock *vs.* Farmers' Loan & T. Co., 158 U. S., 601, 636.

"No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax can not be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, that is to say, without authority of law. Hence, it can not be enforced at all."

That case, though involving a State statute, is peculiarly analogous to the case at bar. There, as here (if Congress has authority to tax the District at all), the legislature had power to levy the tax complained of, but acted in excess of that power. There, as here, the

executive and administrative officials sought to enforce the law within constitutional limits only. In that case, the difficulty was that the act could not be enforced without interfering with interstate commerce, and in this case the difficulty is that the act can not be enforced without unlawfully taxing non-residents—"unless it be enforced otherwise than as prescribed by the statute—that is to say, without authority of law." The oil company was permitted to assail the constitutional portion of the New Mexico statute because it was inseparable from the unconstitutional, and "hence, it can not be enforced at all," which is the precise situation here.

The case of Oklahoma *vs.* Wells, Fargo & Co., 223 U. S., 299, involved the constitutionality of a statute of Oklahoma imposing a tax upon the gross revenue of corporations, and included revenue derived from investments and bonds and lands outside of the State and receipts from interstate commerce. This, it was held, was beyond the power of the legislature. It was urged, however, that the action to enjoin the collection of the tax could not "be maintained for want of a tender of so much of the tax as would have fallen on the receipts from commerce wholly within the State." Answering this contention, this court said (p. 302):

> "But that requirement hardly can be made in this case, which is not like one where the law simply fails to allow certain proper deductions. People's National Bank *vs.* Marye, 191 U. S., 272. Whether the statute could be construed as separable of course would be ultimately for the state court in any event. Telegraph Co. *vs.* Texas, 105 U. S., 460. But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the

statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could even if less than all, Ratterman *vs.* Western Union Telegraph Co., 127 U. S., 411, it is a tax on a proportion of total gross receipts, a considerable part of which, as we have explained, the state has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

See also McFarland *vs.* American Sugar Co., 241 U. S., 79, 87.

In Sully *vs.* American National Bank, 178 U. S., 289, 299, this court said:

"Under this provision of the section, creditors of the land company residing in Tennessee, whose debts accrued prior to the filing and registration of the Sully, trustee, mortgage were by the decree of the court below preferred in payment over the mortgagee. By reason of such preference Carhart did not receive what he would have received, but for the preference so given. He claims that this preference in favor of resident creditors, whose debts existed when his mortgage was registered, is an illegal discrimination against him as a non-resident mortgagee, because the statute, as he says, while directing such a discrimination against a non-resident mortgagee, does not permit it as against a resident mortgagee. Such a discrimination, if it existed, is invalid within the decision of Blake *vs.* McClung, *supra*.

"It is subjected, however, on the part of the defendants in error, that this is a merely abstract or moot question, because there are no resident mortgagees, and their rights have not, therefore, been determined. The objection is not well taken. Although there are no resident mortgagees in this case, yet the decree of the court

> below, following the statute, has postponed the payment of the mortgage, in favor of resident creditors whose debts accrued prior to the registration of that mortgage. If the statute does not permit such postponement against a resident mortgagee, then the postponement in the case of a non-resident mortgagee would be invalid. The postponement has in fact been made as against the non-resident mortgagee, and whether that postponement was legal and valid is no mere abstraction, because by reason thereof this non-resident mortgagee has actually suffered a loss in the payment of his mortgage. It is, therefore, entirely immaterial whether in this particular case there are or are not resident mortgagees."

So, here, if the Intangible Tax Law is wholly void, any assessment made thereunder is invalid, and plaintiffs in error have suffered such a loss in paying the same under protest as will entitle them to maintain this action.

The law here involved is not a state statute, but an act of Congress relating to the District of Columbia which this court, as well as the courts below, has jurisdiction to construe. Smoot *vs.* Heyl, 227 U. S., 518. In such a case, if the invalidity of a portion of an act renders the whole act void, any person affected by the enforcement of the act may challenge its validity, irrespective of whether he comes within the class discriminated against; for the reason, as previously stated, that his rights are necessarily impaired by the attempted enforcement against him of a void law.

The general rule relating to the persons who may question the constitutionality of an act is stated in 12 Corpus Juris, 764, as follows:

> "A person whose rights are affected by one portion of a statute may not question the con-

stitutionality of another portion, where the operation of the provision affecting him will not be influenced by the validity or invalidity of the contested provision; but, conversely, he may question the constitutionality of a provision of a statute not affecting him where the invalidity of such provision would render the entire act void."

In State *vs.* Bengsch, 170 Mo., 81, 114, the court said:

> "And although defendant is not prosecuted as a manufacturer of either distilled or vinous liquors, yet if it is apparent on the face of the act that it was framed as an *entirety*, and would not have received the legislative sanction but for the fact that it was intended to operate as a whole, then, this being the case, any party prosecuted under the challenged act may raise the question of the unconstitutionality of a portion of the act in circumstances already related, and thereby show the invalidity of the whole. We hold the whole act must go by the board in consequence of those circumstances. States *vs.* Bockstruck, 136 Mo., 353-4."

In State *vs.* Cumberland Club, 136 Tenn., 84, 100, the court said:

> "But it is urged by the State that inasmuch as the defendants were not indicted for storing or selling intoxicating liquors at any place other than upon their own premises, they have no standing to make the question. . . . As said in Richardson *vs.* Young, 122 Tenn., 471, 522, no one has the right to attack a particular provision in a statute as unconstitutional, unless it affects him personally, or unless, if the attack be sustained, 'the effect would be to render the entire act void.' Such is the effect of a successful attack for violation of the two-subject clause article 2, section 17) of the constitution. When

> an act is void under that provision of the constitution any one against whom such act is sought to be enforced may attack it on that ground, and if successful he will be relieved of whatever burden the statute in any of its parts seems to impose on him.
>
> "But it is insisted for the state that we should cut out the subject not within the title, pursuant to the rule announced in State ex rel *vs.* Trewhitt, 113 Tenn., 561, and cases in accord therewith, and thus save the act. But the two subjects are so interwoven that this can not be done."

And in People *vs.* McBride, 234 Ill., 146, the court said:

> "Counsel disputes the validity of various provisions by which plaintiff in error was not injuriously affected unless such provisions are void and their invalidity renders the whole act void. Courts do not entertain objections to the constitutionality of an act unless the objection is made by one whose rights have been in some way affected, and the plaintiff in error is only entitled to a consideration of most of the questions raised by his counsel so far as they affect the validity of the act as a whole."

In no case has this court ever refused to hold an act of Congress void on the ground that the party assailing the act was not affected by it in the particular complained of, except in those cases where the provisions of the act were found to be separable. This distinction is pointed out in United States *vs.* Delaware & Hudson Co., 213 U. S., 366, 417, as follows:

> "The question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made."

See also Rainey *vs.* United States, 232 U. S., 310, 315.

In the Employers' Liability Cases, 207 U. S., 463, actions were brought under the Employers' Liability Act of 1906 to recover damages occasioned by the deaths of the respective intestates while serving as firemen on locomotives actually engaged in moving *interstate commerce trains*. On the one hand it was contended that the act was wholly void, in that it sought to embrace intrastate as well as interstate commerce. On the other hand, it was contended that the act could be sustained so far, at least, as these particular actions were concerned. But this court held the entire act void, saying (p. 504):

> "Concluding, as we do, that the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and non-enforceable and the judgments below are, therefore, affirmed."

In Illinois Central R. Co. *vs.* McKendree, 203 U. S., 514, an action was brought against the railroad company for transporting certain cars of infected cattle from a point in Tennessee to a point in Kentucky in violation of an order promulgated by the Secretary of agriculture under authority of an act of Congress. The constitutionality of the order was challenged on the ground that it embraced intrastate as well as interstate commerce. In holding the whole order void, this court said:

> "Nor have we the power to so limit the secretary's order as to make it apply only to interstate commerce, *which it is urged is all that is here involved*. For aught that appears upon the face of the order, the secretary intended it to apply

> to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing. The order is in terms single, and indivisible." (Italics ours.)

In United States *vs.* Reese *et al.*, 92 U. S., 214, two inspectors of election were indicted for refusing to receive and count the vote of a person of African descent. The indictment was based upon an act of Congress making it an offense to prevent a citizen from exercising the right to vote. This court, affirming the decision of the lower court sustaining a demurrer to the indictment, held that, although Congress had the power to enact a law covering the offense there charged, yet the whole act was void, because its terms were broad enough to cover acts beyond its constitutional jurisdiction.

And in Baldwin *vs.* Franks, 120 U. S., 678, Baldwin had been arrested for a violation of section 5519 of the Revised Statutes in conspiring with others to deprive certain subjects of the Emperor of China of rights granted under treaties. It was held that, while Congress could provide for the punishment of persons conspiring to deprive persons of their rights under the Constitution, laws, or treaties of the United States, the whole act was void, on the ground that it also applied to conspiracies to deprive citizens of their rights under State laws.

See, also, Trade Mark Cases, 100 U. S., 82.

In the five cases last referred to, this court upheld without discussion, the right of one not affected by the particular provision of the act complained of to challenge the constitutionality of the whole act, apparently not deeming the question worthy of consideration.

What we have said above also applies with equal force to the right of plaintiffs in error to question the validity of the act because it attempts to tax the bonds and

other obligations of States and their municipal corporations.

As to the right to challenge the law through the clause exempting the shares of stock of business companies, which by reason of or in addition to incorporation receive no special franchise or privilege, the ground of attack is that this clause is incapable of intelligent definition. The record shows (p. 4) that plaintiffs in error held stocks in business companies. If, as we contend, this clause is without meaning, how could allegations be made to show that such companies receive no special franchise or privilege? Before it can be said that that these companies do or do not receive special franchises or privileges, this exempting clause must be defined. And we contend that definition is impossible. And so of the questions presented in our additional brief relating to the 6th and 7th assignments of error. Any tax-payer is entitled to question the power of Congress in this regard.

We submit that both on principle and by the practically unanimous decisions of this and other courts the plaintiffs in error have the right to maintain this action, and to present every question involved in it.

II.

The Act of 1917 Contains Three Provisions Which are Beyond the Power of Congress and Render the Whole Act Void.

1. *The act requires every non-resident of the District of Columbia who engages in business therein to pay a tax on all his intangible property wherever situated or from whatever source derived with certain exceptions applicable alike to residents and non-residents.*

That this is beyond the power of Congress would seem to be plain. There is no precedent for such an attempt,

and therefore no decisions in regard to it. But an analogous question concerning the powers of the State governments to tax the property of non-residents has frequently been under consideration by this court, and the reasoning of those cases would seem to be conclusive here.

In the case of State Tax on Foreign-Held Bonds, 15 Wall., 300, 319, it was said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

And in the recent case of Looney *vs.* Crane Co., 245 U. S., 178, 188, in which there was involved a question as to the right of a State to tax the property of a corporation which was "wholly beyond the confines of the State and not subject to its jurisdiction," the court said, it may not be doubted that this constituted "a taking without due process," and added:

> "Indeed the cases referred to were concerned in various forms with the identical questions here involved and authoritatively settled that the States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State in violation of the Constitution, or because of the right to exclude to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State in disregard, not only of the commerce clause, *but of the due-process clause of the Fourteenth Amendment.*" (Italics ours.)

In International Paper Co. *vs.* Massachusetts, 246 U. S., 135, 141, the court again held that a State may not tax property of a foreign corporation which is not located or used in the State, on the ground that such a

tax is forbidden, both by the interstate commerce provision of the original Constitution, and by the due process clause of the Fourteenth Amendment.

As the Fifth Amendment to the Constitution gives the same protection in this regard to the people of the District of Columbia (Callan *vs.* Wilson, 127 U. S., 540, 550) which the due process clause of the Fourteenth Amendment gives to the people of the States, it follow that Congress in exercising its functions as the governing power of the District may not lay a tax on property belonging to non-residents which is not in the District.

To bring this act within the power of Congress, it is necessary to limit the phrase "the moneys and credits" to property within the District of Columbia. But this limitation would then apply to residents and non-residents alike, when Congress had the power and clearly intended to tax the intangible property of residents wherever situated. To so qualify this phrase when applied to the property of both residents and non-residents would be construction contrary to the intent of Congress; to qualify it when applied to the property of residents alone, would be legislation.

Employers' Liability Cases, 207 U. S., 463.

Confronted by this obvious difficulty in the act, the District authorities were called upon to decide what their duty might be by a request for information on the subject by a lawyer who resided in Maryland but practiced his profession in Washington and so was "engaged in business" here. The result was an opinion by the Corporation Counsel, accepted and acted upon by the Commissioners of the District, which concluded thus:

> "I recommend that the assessor be advised that non-resident professional men practicing their professions in the District are taxable to

> the amount derived from such business in the District, but not money, credits or securities earned elsewhere and brought here for safe keeping."

Accordingly, in the printed circular of instructions to tax-payers by the Commissioners we find this paragraph:

> "Non-resident professional men practicing their professions in the District of Columbia, are taxable to the amount derived from such business in the District, but not money, credits, or securities earned elsewhere, and brought here for safe keeping."

Why this distinction is made between professional men and other non-resident persons and corporations engaged in business in Washington we have to leave to opposing counsel to explain. But there is obviously not the slightest warrant in the act itself to justify requiring non-residents carrying on business here to keep their intangibles purchased out of the earnings of their local business in the District separate from their other intangibles, and taxing the one and exempting the others.

Nor has Congress the power to levy a tax upon non-residents on their moneys, credits and securities merely because they were derived from business done within the District of Columbia. This power is limited to property forming part of the capital used in such business, and when that property is withdrawn from the business the right to tax is gone.

In the case of Buck *vs.* Beach, 206 U. S., 392, 406, this court, in holding that the State of Indiana had no power to levy a tax upon notes merely kept in that State by a resident of Ohio, said:

> "There are no cases in this court where an assessment such as the one before us has been

> involved. We have not had a case where neither the party assessed nor the debtor was a resident of or present in the State where the tax was imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. We can not assent to the doctrine that the mere presence of evidences of debt, such as these notes, under the circumstances already stated, amounts to the presence of property within the State of taxation."

And in the case of Metropolitan Life Ins. Co. *vs.* New Orleans, 205 U. S., 395, 402, this court said:

> "In this case, the controlling consideration was the presence in the State of the capital employed in the business of lending money, and the fact that the notes were not continuously present was regarded as immaterial. . . . We are not dealing here merely with a single credit or a series of separate credits, but with a business."

It will be noted that the act here involved does not purport to levy a tax upon the business of a non-resident, but upon the money and credits of a non-resident engaged in business in the District.

Nor can anything be found in the law which justifies exempting any of the intangible property of non-residents who are carrying on business here when such property is actually located in the District. The express words of the statute require that such persons or corporations must schedule all their intangibles, wherever they may be, which are not specifically exempted.

In the Court of Appeals and in this court, when the case was here before, it was suggested, rather than argued, by opposing counsel that this tax on non-residents engaged in business here might be regarded as a tax on foreign corporations for the privilege of doing business in the District. But (waiving the ques-

tion of the power of Congress in that regard) this requires that the same view should be taken as to non-resident individuals and also as to residents, both corporate and individual. If foreign corporations are taxed for the privilege of engaging in business here, so are the individual non-residents, and necessarily by the same rule residents are taxed for the privilege of residing in the District. No separation of these several classes can be made without rewriting the act. But clearly the act is not a tax on persons or on business. It is a tax on property and as such its validity is to be determined.

It was further suggested in the courts below that, even if this provision of the act is invalid as to non-resident persons and corporations engaged in business in the District, it may be enforced against all persons who, like the plaintiffs in error in this case, are residents. But this would place upon residents alone a burden which Congress plainly intended should be shared by non-residents who come here to compete in business with residents. If this view of the act should be upheld a corporation organized under the laws of one of the States or under the laws of any foreign country could carry on business in Washington next door to a District corporation engaged in the same business and escape this tax altogether. A District corporation could surrender its charter, take out a new one from Maryland or Virginia and go on with its business free from this tax. Obviously this is not what Congress intended.

The only serious question on this branch of the case, is this: May the court, notwithstanding the invalidity of the act in this regard, enforce it in so far as its provisions are constitutional, thereby permitting the taxation of non-residents on their intangible property within constitutional limits?

But this court in several thoroughly considered cases has held that this may not be done.

In United States *vs.* Reese *et al.*, 92 U. S., 214, 221, an act of Congress making it a crime for inspectors of election to wrongfully refuse to receive the vote of a citizen when presented under certain circumstances, was held void because not confined in its operation to a discrimination on account of race, color, or previous condition of servitude. To the suggestion that the act might be enforced so far as its inhibitions were within the power of Congress the court said:

> "The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . .
>
> "To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the Employers' Liability Cases, 207 U. S., 463, 500, holding invalid the first employers' liability act which imposed upon carriers engaged in interstate commerce certain obligations to their employees, it was urged that although the general language of the act embraced the case of an employee engaged solely in intrastate work, the court could limit this broad language by construction and so enforce the law in so far as it was within the power of Congress. But it was held that this would be legislation, not construction, the court saying:

> "So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be inter-

preted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employee' as found in the statute should be held to mean any employee when such employee is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the territories. We say this because immediately preceding the provision of the act concerning carriers engaged in commerce between the States and Territories is a clause making it applicable to 'every common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States.' It follows, therefore, that common carriers in such territories, even although not engaged in interstate commerce, are by the act made liable to 'any' of their employees, as therein defined. The legislative power of Congress over the District of Columbia and the territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read 'any employee when engaged in interstate commerce,' we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy.

. . . . . .

"The principles of construction invoked are

undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois Central Railroad *vs.* McKendree, 203 U. S., 514, and authorities there cited."

. . . . . .

"As the act before us by its terms relates to every common carrier engaged in interstate commerce and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress regulate."

In Guinn *vs.* U. S., 238 U. S., 347, the validity of a provision of the Constitution of Oklahoma was involved. It required a literary test for voters but excepted from the test voters who had the right to vote

before 1866—the ordinary so-called grandfather clause, aimed at the colored voter. Holding the grandfather clause void the court was urged to maintain the literary test without the excepting clause. But the court said that would be to require a literary test from the 1866 class in the face of the plain language excusing them therefrom. So the whole provision failed.

In Harrison *vs.* St. L. & S. F. R. R., 232 U. S., 318, an act of the Oklahoma legislature was held void which unreasonably interfered with the right of foreign corporations, when sued in the State courts, to remove the case to the Federal courts.

To the argument that the act should be construed "simply as an effort on the part of the State to exercise *reasonable* control over corporations within its borders" the court said (p. 333):

> "The argument . . . comes at last to the contention that the more plainly an enactment violates the Constitution, the more urgent the duty of deciding that it does not do so."

In Williams *vs.* Talladega, 226 U. S., 404, there was involved the question whether a city ordinance could be sustained which taxed telegraph companies doing business in the States. The State court had held that the ordinance could not be construed as applying only to business other than the sending of messages by the General Government. Because Government business was not excluded, this court said (p. 419):

> "This part of the license exacted necessarily affects the whole and makes the tax unconstitutional and void."

In the case of Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 540, where the court had under consideration a trust statute of Illinois declaring that the provisions of the act should not apply "to agricultural products or

live stock while in the hands of the producer or raiser," it was held that, as this exemption discriminated against persons engaged in other businesses, the whole act was, therefore, void. The court said (p. 565):

> "If the latter section be eliminated as unconstitutional, then the act, as it stands, will apply to agriculturists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. . . . The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional."

And the same holding was made in the case of Spraigue *vs.* Thompson, 118 U. S., 90, 94, where a statute relating to the employment of pilots exempted from its operation ships from certain ports. The contention was there made that, although the exempting clause was invalid, it was separable from the balance of the act. The court, however, said:

> "But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

Furthermore, it must be borne in mind that this is not a remedial statute, to be liberally construed, but a taxing statute, containing penal provisions, to be strictly construed. Gould *vs.* Gould, 245 U. S., 151. This distinction is clearly pointed out in Butts *vs.*

Merchants Transp'n Co., 230 U. S., 126. There, an action had been brought by a colored woman to recover penalties under the civil rights act on the ground that she had been denied certain rights and privileges on the high seas. The act in question provided "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement," and "that any person who shall violate the foregoing section . . . shall, for every such offence, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby." This court had previously held that the act was void as applied to the States (Civil Rights Cases, 109 U. S., 3). But it was contended that the act was valid as to violations on the high seas, over which Congress had jurisdiction. The court, however, held the whole act void. In distinguishing the case from El Paso & N. Ry. Co. *vs.* Gutierrez, 215 U. S., 87, holding that the Employers' Liability Act, though void as to the States, could be enforced in the Territories and in the District of Columbia, it was said (p. 137):

> "That act was quite unlike the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. Its applicability to the District of Columbia and the Territories did not depend upon the same words which made it applicable to interstate commerce. . . .
>
> "Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, 'within the jurisdiction of the United States,' which alone indicate where the sections are to be operative."

In Baldwin *vs.* Franks, 120 U. S., 678, 685, section 5519 of the Revised Statutes was held to be wholly void because its general language went beyond the power of Congress in providing for the punishment of conspiracies to deprive persons of their rights. Urged to give the law effect in so far as it was within the power of Congress, the court said:

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a Territory, though not in a State, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a State and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

And in Oklahoma *vs.* Wells, Fargo & Co., 223 U. S., 298, 302, this court had under consideration a statute providing for the taxation of express companies upon "such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business," and "for the purpose of determining the amount of such tax" required such companies to report under oath their gross receipts "from every source whatsoever."

This court held the entire act void because it included income from investments in bonds and land outside of the State.

To the same effect are:

Trade-Mark Cases, 100 U. S., 82.
Illinois Central R. Co. *vs.* McKendree, 203 U. S., 514.
Bowman *vs.* Continental Oil Co. (U. S. Sup. Ct.), decided June 6, 1921.

Therefore, if, as we contend, the provision of the act here involved levying a tax upon intangible property of non-residents is void as to such property which is not in the District of Columbia the whole act must fall. It is a well-recognized fact that, because of the limited area of the District of Columbia, a large portion of the business therein is transacted by non-resident individuals, firms and corporations. If only residents are subjected to the tax the result would be a discrimination against them not intended by Congress. Residents engaged in business here would be placed at a disadvantage in competing with non-residents.

2. *The act requires a non-resident engaged in business in this District to pay a tax on all his credits or choses in action, whether due from residents or non-residents, including those which have not been reduced to concrete form.*

As to non-residents this is beyond the power of Congress even as to credits arising out of District business.

By a series of cases in this court, it is settled that a State may tax the intangible property of a non-resident forming part of the capital of business carried on by the non-resident in the taxing State, except that no power exists to tax credits which have not been reduced to concrete form when due from non-residents of the State.

State Tax on Foreign-held Bonds, 15 Wall., 300, 320.

Board of Assessors *vs.* Comptor National, 191 U. S., 388, 402.

Liverpool Ins. Co. *vs.* Orleans Assessors, 221 U. S., 346, 356.

Buck *vs.* Beach, 206 U. S., 392, 406, 407.

In the ordinary course of business, non-resident merchants and manufacturers engaged in business in Washington sell their goods to non-residents on open account. The resulting credits exist only in the minds of the buyer and seller. They are mere choses in action. They are debts due from persons or corporations who are not within the District of Columbia. So, a loan may be made by a non-resident engaged in business here to another non-resident, no written obligation being taken from the borrower. In these and all similar cases a credit arises, but there is nothing which can be made the subject of taxation here.

Opposing counsel will insist that the court, to save the constitutionality of the act, should construe it as not including credits of non-residents which are not taxable under the rule laid down in the cases above cited. But as already shown under the next preceding head of this brief, this would necessitate limiting in the same way the taxable credits of residents also, contrary to the

obvious intention of Congress. There is no escape from the conclusion that the whole act falls except by doing that under the guise of construction which amounts to legislation.

3. *The act taxes bonds and similar obligations whoever may be the obligor. It, therefore, necessarily includes obligations of the States and their municipal corporations. But these Congress may not tax. Consequently the whole provisions in this regard fails.*

In Farmers' Bank *vs.* Minnesota, 232 U. S., 516, in which case the question involved was the right of the State of Minnesota to tax the bonds issued by municipalities in Indian Territory and the Territory of Oklahoma, the court, after holding that "the Territory of Oklahoma, therefore, was an instrumentality established by Congress," and that "to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them," said (p. 526):

> "It is on this ground that United States bonds have always been held exempt from taxation under authority of the States. By like reasoning it has come to be recognized that bonds issued by the States are not taxable by the Federal Government, and it was upon this ground that this court held, in Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 429, 584, that the income tax provisions of the act of August 15, 1894, were unconstitutional in that they imposed a tax upon the income derived from municipal bonds issued under the authority of the States."

And in the Pollock case (157 U. S., 429), above referred to, the court said:

> "As the States can not tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that

> the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.
>
> "A municipal corporation is the representative of the State and one of the instrumentalities of the State government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. Collector *vs.* Day, 11 Wall., 113, 124; United States *vs.* Railroad Company, 17 Wall., 322, 332."

There is no room for argument on this point as to what the act requires. It was so construed by the authorities charged with the duty of enforcing it. In at least two sets of circulars which were sent to taxpayers soon after the law was passed instructing them how to fill out the blank forms prepared for them, they were told that:

> "Municipal or State bonds are not exempt from taxation."

This was corrected in later editions of the circular, and in both courts below counsel for the District conceded that obligations of the States and their municipalities could not be taxed by the General Government. Thus there arose the question whether, although void as to State obligations, the act may still be enforced as to other classes of obligations which Congress may lawfully tax.

The cases in this court to which we have previously referred would seem to be conclusive on this point. To uphold the law at all the court must write into it an exception as to State obligations rendering non-taxable what Congress has said shall be taxed and placing the whole burden on other classes of obligations in the absence of anything in the act to indicate that Congress intended such a result.

By the income tax act, which was held void in Pollock

vs. Farmers' Loan & Trust Co., 158 U. S., 601, 635, 637, Congress undertook to levy a tax upon incomes in general terms. Because the act did not exclude income derived from real estate and invested personal property, and was therefore in effect a direct tax not apportioned among the States as required by the Constitution, it was held that it could not be enforced at all. To the suggestion that it should be enforced to the extent that it was not unconstitutional, the court replied:

> "Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act . . . are wholly inoperative and void."

III.

The Provisions of the Act of 1917 as to the Tax on "Shares of Stock" Are So Vague that it is Impossible to Determine What Shares Are Taxable and What Are Exempt; So That So Much of the Act as Relates to them is Void. Consequently, the Whole Acts Falls.

As to shares of stock the act has the following provisions:

1. General language requiring all such shares to be listed.

2. Exception of shares of stock of corporations within the District the taxation of which "is hereby provided for."

3. Exemption of shares of stock of "business companies" which by reason of or in addition to incorporation "receive no special franchise or privilege."

Residents of this District and non-residents engaged

in business here hold shares of stock in thousands of "business" corporations holding charters—granted either by special act or by general incorporation laws—from every State in this Union, and doubtless from every civilized country in the world. Probably no two of these charters and no two of such general incorporation statutes are alike. In the case of every tax-payer—person, firm, or corporation—the question arises whether the shares of stock which the tax-payer holds were issued by a corporation receiving some special franchise or some special privilege. This necessarily involves an examination of the corporation's charter, and, in most cases, an examination of the general incorporation law under which the charter was obtained. Imagine the predicament of the taxpayer, sending for all the charters and general incorporation laws involved in his case, and then trying to determine which of them has received a *special franchise* or some *special privilege* within the meaning of this statute.

In the Supreme Court of the District of Columbia, counsel for the District, as to this, said in their brief:

> "It has been suggested that the foregoing exemption applies to non-residents as well as resident companies. Congress, however, was speaking of District corporations, and provided that all corporations should be taxed as individuals in similar lines of business; moreover, this exemption relates to the exemption of certain corporations from taxation and not to the exemption of individuals, who are not concerned with this classification."

In the Court of Appeals opposing counsel again contended that this exemption applies not to shares of stock at all, but to corporations. That is to say, the District insists that the question is whether certain *corporations* only shall be exempted from paying this

tax because they have no special franchise or privilege.

But if we adopt the contention of the corporation counsel, the exempting clause nullifies itself. It would read: "That such tax on moneys and credits shall not apply to . . . business companies . . . but all such corporations shall be rated, assessed, and taxed as individuals," etc. Thus, business companies are exempted from the tax in one clause, and subjected to it in the next.

It is a singular fact that, while the corporation counsel make this contention in court, yet every edition of the circular of instructions to taxpayers which the District authorities have issued from time to time contains, under the head of "Exemptions," the following paragraph:

> "3. Shares of stock of any business company incorporated in the District of Columbia, and receiving no special franchise or privilege in addition to incorporation, whose property real and personal or capital stock, is subject to taxation here."

More singular still is it that, although counsel for the District were urged by us, both orally and in writing in both courts below, to inform the court what meaning they give to the phrase "special franchise or privilege," they have declined to do so.

Thus, the individual taxpayer is instructed that he is obliged to return in his schedule only the shares of stock which are not within this exemption; the court is told that corporations only, not the individual taxpayer, is entitled to the exemption; and, so far, the court has not been told what the exemption is supposed to mean. We can only indulge the hope that counsel for the District in this court will depart from their policy of silence in this regard.

This difficulty is intensified by what follows this exempting clause in the act. It is said that "all such

corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed and taxed."

If anything in this act is clear, it is that the taxpayer, individual or corporate, is to include in his return shares of stock in foreign as well as in District corporations. The language of the act just quoted requires the taxation of *all* corporations which receive no "special franchise or privilege," as if they were individuals. Yet it is inconceivable that the author of this act could have supposed that for the purpose of paying the expenses of the District government Congress could levy a tax on all the corporations in the world. The only escape from this difficulty is to assume, in the face of the most explicit language to the contrary, that throughout the act only shares of stocks in District corporations are referred to.

In this dilemma counsel for the District in the Court of Appeals, sought to clarify the situation by referring to legislation relating to the taxation of tangible property in this District. What that is we proceed to examine.

IV.

There Is Nothing in the Other Acts of Congress Relating to Taxation in the District of Columbia Which Obviates in any Degree any of the Objections to the Act of 1917 Above Set Forth.

The District appropriation bill, providing for the fiscal year ending June 30, 1903 (32 Stats. L., 590, 617), carries by section 6 a comprehensive system of taxation in the District of Columbia. It first amends the statutes relating to the taxation of real estate and then imposes a tax on tangible personal property and a license tax on many kinds of business. A copy of this section forms an appendix to this brief. It will be referred to by us as the act of 1902.

In the District appropriation bill, providing for the fiscal year ending June 30, 1917 (39 Stats. L., 676, 717), there was placed an amendment to the act of 1902 by which, for the first time, Congress undertook to tax intangible property in the District of Columbia. This amendment, which we shall call the act of 1916, is as follows:

> "Sec. 11. Section six of the act of July first, nineteen hundred and two, 'An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes,' is hereby amended by adding, after paragraph two of said section:
>
> "That the moneys and credits, including moneys loaned and invested bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph one of said section six for listing and appraisal of tangible personal property, and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District four-tenths of one per centum of the value thereof: *Provided*, That savings deposits of individuals in a sum not in excess of $500 deposited in banks, trust companies or building associations, subject to notice of withdrawal and not subject to check, shall be exempt from this tax: *Provided further*, That a joint committee consisting of the Committee on the District of Columbia of the Senate and the Committee on the District of Columbia of the House of Representatives is hereby appointed to make by subcommittee or otherwise a careful and exhaustive study of the tax laws of the

> District of Columbia, including license taxes, with a view of recommending such changes in the laws as the joint committee may deem fair and equitable, report to be made to the Congress during the next session."

It will be seen that the act of 1916 is an amendment to the act of 1902, and that the act of 1917 is a substitute for the act of 1916; so that the latter is to be read as a part of the act of 1902.

The District authorities correctly held that the act of 1916 was not operative during the fiscal year in which it was passed. Before the next fiscal year it was superseded by the act of 1917. We are not therefore concerned with it except in so far, if at all, as it may aid in the construction of the later act.

There is nothing in the act of 1902 which relieves the act of 1917 of the objections growing out of its attempt to tax intangible property of non-residents not within the District, or not reduced to concrete form, or its failure to exclude State obligations from taxation by the general Government. It does, however, contain provisions which are claimed by counsel for the District to lead to an intelligible construction of the exempting phrase "special franchise or privilege."

By paragraph 5 of the act of 1902 a tax is imposed upon the gross earnings of incorporated banks and trust companies and upon all gas, electric lighting and telephone companies in the District. It continues the then existing tax on the gross receipts of street railroad companies.

Paragraph 8 imposes a tax on the value of the capital stock of all corporations organized in the District or under the law of any State or Territory chiefly for the purpose of transacting business in the District, but adds this proviso:

> "That nothing in this act contained shall be con-

> strued to include newspaper, real estate, and mercantile companies, which by reason of incorporation receive no special franchise or privilege; but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed."

It is urged by counsel for the District that this language aids in clearing up the meaning of the corresponding proviso of the act of 1917. To our mind it only adds to the confusion of ideas.

Did Congress intend by this proviso of 1902 to declare that newspaper, real estate and mercantile companies as a separate class of corporations receive no special franchise or privilege? This seems to be absurd; for it is impossible to conceive of any distinction in this regard between corporations that print newspapers and those that print lawyers' briefs or court records, between corporations that buy and sell real estate and those who buy and sell bonds and stocks, or between mercantile companies and manufacturing companies.

If, on the other hand, Congress intended to have the assessor distinguish between newspaper, real estate, and mercantile corporations that receive no special franchise or privilege and those of the same classes that do, we are left in the dark as to what is meant by a "special franchise or privilege" in the act of 1902, just as we are left in the dark as to what those words mean in the act of 1917.

But opposing counsel have suggested that this exemption refers only to public service corporations—the street railway, gas, telephone and electric lighting companies—and the banks which do get special privileges, and that the exemption under consideration applies to ordinary business corporations. But this leads to a still greater difficulty in construing the act of 1917, with which only

we are now directly concerned. At the beginning of that act we find that shares of stock of banks and other corporations within the District of Columbia the taxation of which is "hereby" provided for are excepted from taxation under the act. Under this exception the holder of shares of stock of the gas, electric light, and telephone corporations of the District and in the District banks and trust companies is not required to include any of them in this return. This, say counsel, because they *do* receive special franchises and privileges by virtue of their incorporation. Now, if shares of stock in all District corporations which do not receive such special franchise or privilege are excepted by the proviso we are considering it, follows that no tax can be levied under the law upon the shares of stock of any District corporation.

To this absurd conclusion the District authorities have been forced in their efforts to give intelligible effect to that which is unintelligible. In answer to the inquiry of a taxpayer on the subject, the board of personal tax appraisers, in a letter dated July 30, 1920, replied:

> "Referring to your inquiry as to what is the meaning of the phrase of the law—'nor to the shares of business companies which by reason of or in addition to incorporation receive no special franchise or privilege,'—you are advised that this particularly applies to the shares of stock of corporations whose tangible assets are located in the District of Columbia, but who receive no special franchise or privilege through acts of Congress. In accordance with the above, the shares of stock of companies incorporated in the District of Columbia whose tangible assets are located here would be exempt in this jurisdiction under the intangible tax law."

The act of 1916 contains nothing which throws any light on this subject. It results that, even considering

together as *in pari materia* the acts of 1902, 1916, and 1917, it is out of the question for the court, much less for the taxpayer, to determine what are the shares of stock which were intended to be exempted under this proviso.

Since shares of stock in corporations must, therefore, be altogether excluded from taxation under this act, because it is impossible to determine what shares are exempt and what are taxable, the act can not be sustained in any part. This class of intangible property is probably greater than any other. To omit it, and yet tax the other classes of intangibles, would be a clear departure from the intention of Congress.

In International Harvester Co. *vs.* Kentucky, 234 U. S., 216, a State statute was held void which made it a crime for corporations to combine to control prices "with the effect of fixing a price that was greater or less than the real value," the court saying that the defendant in that case was not bound to "say what would have been the price in an imaginary world." That case was followed in American Seeding Machine Co. *vs.* Kentucky, 236 U. S., 660, in which case the court said that in the Harvester Company case the Kentucky law was held invalid because it "offered no standard of conduct that it was possible to know."

V.

The Proceedings in Congress Relating to the Acts of 1902, 1916 and 1917 Contain Nothing Which Obviates Any of the Objections to the Act of 1917.

As this court has held that within certain limitations the proceedings in the House and Senate may be examined in aid of the construction of ambiguous language in statutes (United States *vs.* St. Paul, etc., R. Co., 247 U. S., 310, 318), we have ventured to follow the passage through Congress of the District appropriation

bills to which the acts of 1902, 1916 and 1917 were respectively attached to see what light may thereby be thrown upon those clauses of the act of 1917 which we have criticised adversely above. Leaving it to the court to determine to what extent, if at all, what we have discovered in this way may be taken into consideration in passing upon our foregoing objections to the act of 1917 we submit the result of our investigations.

By an act approved June 11, 1878 (20 Stat. L., 102), it was provided, among other things, that one-half of the expenses of the District should be paid by the General Government and the other half by District taxation. This provision has been in effect ever since, except that for the current fiscal year and the year preceding the proportion has been fixed at forty per cent by the United States and sixty per cent by the District.

About eleven years ago some members of Congress sought to have this half-and-half system, as it is called, done away with on the ground that it had resulted in the people of the District excaping taxation commensurate with that of other cities of approximately the same population. This was disputed by other members of Congress. The result was an act approved March 3, 1915 (38 Stat., 894), authorizing the appointment of a joint committee of Congress to investigate and report on the subject of the fiscal relations between the United States and the District of Columbia. This committee was composed of three members of the Senate and three members of the House of Representatives. It sat for several weeks, taking a great mass of evidence, written and oral, and hearing arguments for and against the half-and-half plan. In January, 1916, the joint committee unanimously reached and expressed the following conclusion:

> "The annual tax in Washington is approximately $16 per capita.

"In the judgment of your committee this is a reasonably tax levy at this time, especially when we consider, as we must, that a large proportion of the population here pays but a small amount of the taxes imposed."

Vol. 1, page XXII, Report of Committee on Fiscal Relations between the United States and the District of Columbia.

When the District appropriation bill, which ultimately had added to it the act of 1902, reached the Senate it carried a provision for the taxation of intangible proerty in this District. The Committee on Appropriations of the Senate in lieu of a tax on intangible property, submitted a measure levying a tax on the gross receipts, capital stock or surplus of certain classes of corporations and a system of license taxes. The Senate approved this amendment, the resulting conference committee of the two houses accepted the amendment, and so the act of 1902 came into being (see appendix).

It will be noted that the drastic taxation of this act was proposed as a substitute for the direct taxation of intangible property as provided in the bill as it came from the House. In addition to the taxes which it levies on public service corporations, banks, trust companies and other corporations, it imposes a long list of license taxes on the doing of a great variety of businesses—a list the like of which for extent and variety we believe is not to be found anywhere else in the United States.

When the bill making appropriations for District expenses for the fiscal year ending June 30, 1917, was sent by the House to the Senate it contained nothing relating to taxation. It came from the Committee on Appropriations of the Senate without any such provision. But after the committee amendments had been disposed of, Senator Sterling, on the 2d day of

August, 1916, submitted the following amendment to the act of 1902:

> "That the moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the shares of stock of banks and other corporations within the District of Columbia, the taxation of which banks and corporations is herein otherwise provided for), of any person, firm, association, or corporation resident or engaged in business in said District shall be scheduled and appraised in the manner provided by paragraph 1 of said section 6 for listing and appraisal of tangible personal property and assessed at their fair cash value, and as taxes on said moneys and credits there shall be paid to the tax collector of said District four-tenths of 1 per cent of the value thereof."
>
> 53 Cong. Record, part 12, page 11946.

This amendment at once gave rise to an animated debate which will be found on pages 11946 to 11960 of 53d Congressional Record, part 12. All through the discussion it appears that the object of the amendment was to reach a class of residents of the District who are termed by various Senators "tax dodgers"—intimating that residents of the States where intangible property is taxed become residents of the District, really or ostensibly, to escape from that form of taxation. Thus, Senator Gallinger having reminded the Senate of the taxes levied on corporations by the act of 1902, and especially of the extremely severe system of license taxes therein contained, Senator Gronna (the colleague of the proposer of the amendment) said, page 11951:

> "I believe that we will all agree that if the pending amendment becomes a law it will simply tax a few of the tax dodgers, a few of the people who come here purposely to evade taxation; and not 1 per cent of the class of people whom the Senator from New Hampshire has enumerated would be affected by the pending amendment."

So Senator Vardaman said of the amendment (11957) that it was "a question affecting the rich folk."

Other Senators during this debate said that the proposed tax on intangible property would enable Congress to relieve the poor taxpayers of the District who owned small parcels of land (Nelson, 11948, 11954; Townsend, 11956; Gronna, 11951).

Finally Senator Gallinger induced the Senate to add to the amendment the proviso requiring another joint committee of the two houses of Congress to make—

> "a careful and exhaustive study of the tax laws of "the District including license taxes with a view "of recommending such changes in the laws as "the joint committee may deem fair and equi- "table, report to be made to the Congress during "the next session."

With this added proviso Senator Sterling's amendment passed the Senate. In the conference committee to which the bill then went there was added the further proviso exempting from the tax savings deposits not in excess of $500. Thus amended the bill became a law. And this concludes the parliamentary history of the act of 1916.

The record of the proceedings in Congress of the act of 1917 is noteworthy only for its brevity. The District appropriation bill of that year again came from the House and from the appropriation committee of the Senate without any provision relating to taxation. When the committee amendments had been disposed of Senator Sterling stated that he wished to offer an amendment. The Senator in charge of the bill said he had no objection. The Vice-President remarked that, without objection, the amendment would be considered adopted. There was no objection. The conference committee ac-

cepted the amendment, and it became the act of 1917. It did not emanate from any committee, the proposer of the amendment made no statement in regard to it, and there was no debate about it. The joint committee provided for by the act of 1916 made no report. It made no "careful and exhaustive study of the tax laws of the District." That provision of the act of 1916 was ignored altogether. And the act of 1917, which was passed as a substitute for the act of 1916, made no provision for any investigation.

So, the small landowner of the District was left to pay his land tax as before; the tax on his tangible personalty and his license tax were continued, and there was added the tax on his intangible property. And since this suit was brought the tax on his land has been increased from 1.50 per cent on a two-thirds valuation to 1.95 per cent for the past year and 1.85 per cent for the current fiscal year.

Evidently there is nothing in these proceedings to indicate why Congress, in attempting to tax a few rich men believed to have come to Washington to live in order to escape taxation, enacted a law which requires every person, firm or corporation who resides in the District and every non-resident person or corporation who engages in business here to pay a tax on his or its intangible proerty. Among such non-resident corporations are five great railway systems, all the principal insurance companies of the United States and Great Britain, the Standard Oil Company, and hundreds of other large corporations.

So this act, aimed ostensibly at a few rich "tax dodgers," hits every individual taxpayer in Washington who owns a single share of stock or a single bond or promissory note. Every ten dollars he has in bank subject to check, every ten dollars he has, even in his pocket, he must include in his return and pay on it a tax of three

cents. There is no minimum. The act of 1902 exempts one thousand dollars in value of tangible property when it consists of "household and other belongings" not held for sale, but no exemption in any amount whatever is granted him who owns intangible property, except savings deposits up to $500. Some 27,000 taxpayers of the District are paying this tax. Their average tax is in the neighborhood of thirty dollars. Hence, this act, by its plain terms in this regard, reaches far beyond and far below what its propounders intended to accomplish by it.

The proceedings in Congress throw no light whatever upon the intention of Congress in relation to any of the subjects discussed hereinabove under paragraph I of this brief. None of them was mentioned, even in the debate on the act of 1916.

As to the exemption of shares of stock in corporations which receive "no special franchise or privilege," no one in Congress referred to it; no one explained why the puzzling language of the act of 1902 exempting from the tax on corporate stock *newspapers, real estate and mercantile* companies, which by reason of incorporation receive no special franchise or privilege," was made as to a tax on intangible property more puzzling still by leaving out the words we have italicized.

If the court finds it difficult or impossible to give intelligent construction to all these ambiguities, what shall be said of the plight of the taxpayer who, with the statute before him, sits down to fill out his schedule. It is a serious business for him; for not only is he threatened with a penalty of a $500 fine or six months' imprisonment by the special provisions of the taxing law, but there hangs over him also the punishment for perjury contained in section 858 of the District Code of which he and all other taxpayers are reminded by the printed

form furnished him by the authorities (Rec., p. 3) which is headed:

> "Perjury in this statement is punishable by imprisonment in the penitentiary for not less than two nor more than ten years."

The questions specifically raised by the sixth and seventh assignments of error are treated in an additional brief filed herewith.

Respectfully submitted,

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A. S. WORTHINGTON,
Attorneys for Plaintiffs in Error.

Sec. 6. That in order to provide revenues to meet the appropriations made by this act and appropriations to be hereafter made to provide for the expenses of the Government of the District of Columbia, it is further enacted: That the act of Congress, entitled "An act to provide an immediate revision and equalization of real estate values in the District of Columbia; also to provide an assessment of real estate in said District in the year eighteen hundred and ninety-six and every third year thereafter, and for other purposes," approved August fourteenth, eighteen hundred and ninety-four is hereby amended to take effect from and after July first, nineteen hundred and two, as follows: Section two, line two, strike out the word "three," and insert in lieu thereof the word "five"; section two, line five, after the words "assistant assessors, who," strike out the words "shall hold office for a term of four years, unless sooner removed by said Commissioners for cause satisfactory to them and"; section two, line nine, after the words "per annum" insert the following: "The assessor of the District of Columbia and the members of said permanent board of assistant assessors shall not be removed except for inefficiency, neglect of duty, or malfeasance in office."

That the assessor of the District of Columbia shall designate three of the members of said permanent board of assistant assessors for the assessment of real estate who shall constitute and compose the excise board, under the provisions of the act of the Congress, approved August fourteenth, eighteen hundred and ninety-four, aforesaid; and the two other members of said permanent board of assistant assessors shall be designated by said assessor to compose a board of personal tax appraisers, to assess personal property in accordance

with the provisions of this section; and all five members of said permanent board of assistant assessors, together with the assessor as chairman, shall constitute the board of equalization and review of real estate assessments and also the board of personal tax appeals: *Provided*, That the assessor of the District of Columbia shall act as chairman, *ex officio*, of the several boards aforesaid.

That the two members of the permanent board of assistant assessors designated, as aforesaid, by the assessor, to assess personal property, shall, under the direction and supervision of the said assessor, assess personal property in the District of Columbia as follows:

That hereafter the assessor of the District of Columbia, or his successor in office, shall annually cause to be prepared a printed blank schedule of all tangible personal property and all general merchandise or stock in trade, owned or held in trust or otherwise, subject to taxation under the provisions of this section, and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed, to which shall be appended an affidavit in blank, setting forth that the foregoing presents a full and true statement of all such personal property, taxable capital, or other basis of assessment, or either, as the case may be. When said schedule is ready for delivery, notice thereof shall be given by the assessor by advertisement for three successive secular days in one or more of the daily newspapers published in said District, and a copy of said schedule shall be delivered to any citizen applying therefor at the office of the assessor. Every person, association, corporation, firm, or company in said District liable to taxation hereunder, and every association, company, executor, administrator, guardian, or trustee holding personal property in trust liable to taxation hereunder shall, within thirty days after the last publication of said advertisement, as aforesaid, fill out

the proper blanks and schedules with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof, as aforesaid, before the assessor or one of the other members of the said board of personal-tax appraisers, and the members of the said board are hereby authorized to administer such and all oaths in connection with their duties as assessor and appraisers without charge, or before any person authorized by law to administer oaths; and the address in the District of Columbia of the person, corporation, or company making affidavit shall in each case be given below his, its, or their signature, and thereupon said board of personal-tax appraisers or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for the fiscal year beginning July first, nineteen hundred and two, and each fiscal year thereafter: *Provided*, That if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee shall fail to make and deliver to the assessor or one of the said appraisers, within thirty days after the date of the last advertisement of the notice hereinbefore required, the schedule of his or its said personal property, owned, held in trust, or otherwise, as provided for in this section, then the said board of personal-tax appraisers hereinbefore provided for shall without delay, from the best information they can procure, make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, to which they shall add twenty per centum thereof: *Provided further*, That if the said board of personal-tax appraisers be not satisfied as to the correctness of the return of personal property made by any person, firm, association,

corporation, company, administrator, executor, guardian, or trustee, said board may reject said return, and said board, or any one of the members thereof, may, from the best information he or they can procure, or by making such an examination of the personal property as may be practicable, assess the same in such amount as may to him or them seem just; and notice of the rejection of the sworn return shall be given to the party interested by leaving the same at the address given in said return, and in all such cases there shall be a right of appeal from the action taken by said appraisers to the board of personal-tax appeals, hereinafter provided for, or to their successors in office, within fifteen days after delivery of said notice of rejection as aforesaid: *And provided further*, That if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee shall make a false affidavit touching the matters herein provided for, he or they shall be deemed guilty of perjury, and upon conviction thereof shall be subject to the penalties for that offense now provided by section eight hundred and fifty-eight of the Code of the District of Columbia.

Par. 2. On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses, and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value thereof.

Par. 3. Dealers in general merchandise of every description shall pay to the collector of taxes of the District of Columbia one and one-half per centum on the average stock in trade for the preceding year.

After the passage of this act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year, and es-

tablishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, to conduct such business until a sworn statement of the value of said stock has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied. The assessor is hereby authorized to reassess said stock whenever in his judgment it has been undervalued. The goods, wares, and merchandise of any person or persons, who shall fail to pay the tax required by this paragraph within three days after beginning business, shall be subject to distraint, and it shall be the duty of the assessor to place bills therefor in the hands of the collector of taxes, who shall seize sufficient of the goods of the delinquent to satisfy said tax: *Provided*, That said owner shall have the right of redemption within thirty days or payment of said tax, to which shall be added a penalty of one per centum, together with the costs of seizure. The collector shall sell such goods as are not redeemed, at public auction, after advertisement for the three days preceding said sale.

Par. 4. Hotel companies and the proprietors of hotels shall pay to the collector of taxes of the District of Columbia one and one half per centum on the assessed value of their furniture.

Par. 5. Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, electric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the

collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting and telephone company, four per centum. And in addition thereto the real estate owned by each national or other incorporated bank, and each trust, gas, electric lighting and telephone company in the District of Columbia shall be taxed as other real estate in said District: *Provided*, That street railroad companies shall continue to pay the four per centum per annum on their gross receipts and other taxes as provided by existing law, and insurance companies shall continue to pay the one and one-half per centum on premium receipts, as provided by section six hundred and fifty of the Code of the District of Columbia. That so much of the act approved October first, eighteen hundred and ninety, entitled "An act to provide for the incorporation of trust, loan, mortgage, and certain other corporations within the District of Columbia" as is inconsistent with the provisions of this section is hereby repealed.

Par. 6. All companies who guarantee the fidelity of any individual or individuals, such as bonding companies, shall pay to the collector of taxes of the District of Columbia one and one-half per centum of their gross receipts in the District of Columbia.

Par. 7. Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the first day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus

and undivided profits on the thirtieth day of June preceding.

Par. 8. The capital stock of all corporations, other than those herein provided for, organized in the District of Columbia or under the laws of any of the States or Territories of the United States chiefly for the purpose of and transacting business within the District of Columbia, except those exempted by the laws relating to the District of Columbia, shall be appraised in bulk at its fair cash value by the board of personal-tax appraisers, and the corporation issuing the same shall be liable for the tax thereon according to such value, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the assessed valuation thereof; but from the assessed valuation of such capital stock shall first be deducted the value of any and all real estate owned by such corporation in said District, which real estate shall be separately taxed against said corporation: *Provided*, That nothing in this act contained shall be construed to include newspaper, real estate, and mercantile companies, which by reason of incorporation receive no special franchise or privilege; but all such corporations shall be rated, assessed, and taxed as individuals conduct ing business in similar lines are rated, assessed, and taxed.

Par. 9. Building associations shall pay to the collector of taxes of the District of Columbia four per centum per annum on their gross earnings for the preceding year ending June thirtieth.

Par. 10. The following personal property shall be exempt from taxation.

First. The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain.

Second. Libraries, schoolbooks, wearing apparel, articles of personal adornment, all family portraits, and heirlooms.

Third. Household and other belongings, not held for sale, to the value of one thousand dollars, owned by the occupant of any dwelling house or other place of abode, in which such household and other belongings may be located.

Par. 11. That said board of assistant assessors hereinbefore provided for, with the assessor of the District of Columbia as chairman, shall compose a board of personal-tax appeals, and as such board of personal-tax appeals shall convene in a room, to be provided therefor by the said assessor, on the fifteenth day of November in each year, and public notice of the time and place of such meeting shall be given by advertisement for two consecutive secular days in two daily newspapers published in the District of Columbia. It shall be the duty of the board of personal-tax appeals, between the date of convening and December fifteenth of each year, to hear all appeals made by any person or persons against the assessments made by the board of personal-tax appraisers and to impartially equalize the value of said personal property as a basis for assessment. Any four members of the said board shall constitute a quorum for business, and in the absence of the assessor a temporary chairman shall be selected. They shall be emplowered to diminish or increase such assessments as they may believe to have been returned at other than their true value to such amount as, in their opinion, may be the value thereof, and the action of said board in such cases shall be final. Said board of assistance assessors shall also perform such other official duties as may be required of them by the assessor of the District of Columbia: *Provided*, That in case the personal-tax appraisers shall fail to complete any of the duties in this

section to be by them performed within the time provided therefor the taxation provided by this section shall not by reason thereof be invalid; but such appraisers shall proceed with all reasonable diligence to complete such duties, and their acts shall be valid as if performed within the time fixed therefor. If, at any time within any current year, property subject to taxation under the provisions of this section shall have been omitted from assessment, said board of personal-tax appraisers shall immediately proceed to assess the same for the then current year, giving notice in writing to the persons or corporations so assessed, who shall have a right of appeal within ten days from date of said notice.

Par. 12. That when the taxes on personal property due and payable in each year shall not be paid on or before the first day of June, then and in that event the collector of taxes of the District of Columbia, or his deputy, may distraint sufficient goods and chattels found within the District of Columbia and belonging to the person, firm, association, corporation, company, administrator, executor, guardian, or trustee charged with such tax to pay the taxes remaining due, under the provisions of this law, from such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, together with the penalty thereon and the costs that may accrue; and for want of such goods and chattels said collector of taxes may levy upon and sell at auction the estate and interest of such person, firm, association, corporation, company, administrator, executor, guardian, or trustee in any parcel of land in said District; and in the case of the levy on any estate or interest in land the proceedings subsequent to sale thereof shall be the same as now provided by law in the case of sales for arrears of taxes against real estate; and in the case of distraint of personal property or the levy upon real estate as aforesaid the collector of taxes shall immediately proceed

to advertise the same by public notice to be posted in the office of said collector and by advertisement, three times within one week, in one or more of the daily newspapers published in said District, stating the time when and the place where such property shall be sold, the last publication to be at least six days before the date of sale, and if the said taxes and penalty thereon, and the costs and expenses which shall have accrued thereon, shall not be paid before the day fixed for such sale, which shall not be less than ten days after said levy or taking of said property, the collector shall proceed to sell at public auction in his office, to the highest bidder, such property, or so much thereof as may be needed to pay such taxes, penalty, and accrued costs and expenses of such distraint and sale. Said collector shall report in detail, in writing, every distraint and sale of personal property to the Commissioners of the District of Columbia or their successors in office, and his accounts in respect to every such distraint or sale shall forthwith be submitted to the auditor of the District of Columbia and be audited by him. Any surplus resulting from such sale over and above such taxes, costs, and expenses shall be paid into the Treasury, and upon being claimed by the owner or owners of the goods and chattels aforesaid shall be paid to him or them upon the certificate of the collector of taxes stating in full the amount of such excess.

Par. 13. That all taxes levied under the foregoing provisions of this section shall be due, payable, and collectable at the same time and times as the general tax on real estate in said District, and shall be subject to the same penalties for non-payment thereof until distraint or sale as hereinbefore provided.

Par. 14. That private banks or bankers not incorporated shall pay a tax of five hundred dollars per annum. Every person, firm, company, or association

not incorporated having a place of business where credits are opened by the deposit or collection of moneys or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion bills of exchange, or promissory notes, or where stocks, bonds, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a private bank or banker.

Par. 15. General brokers shall pay a tax of two hundred and fifty dollars per annum. Every person, firm, company, or association not incorporated (except insurance and real estate brokers acting as such) that solicits business from the general public by advertisement or otherwise, and that purchases, sells, or negotiates for others securities, shares, stocks, bonds, exchange, bullion, coin, money, bank notes, or promissory notes, or that deals in futures on market quotations of prices or values on merchandise, shares, stocks, bonds or others securities, or accepts margins on prices or values of said shares, stocks, bonds, merchandise, or securities, shall be deemed a general broker: *Provided*, That the Washington Stock Exchange, through its president or treasurer, shall pay to the collector of taxes of the District of Columbia a sum equal to five hundred dollars per annum in lieu of tax on the members thereof for business done on said exchange: *Provided further*, That any broker who is a member of a regularly organized stock exchange located outside of the District of Columbia and transacting a brokerage business therein, shall pay a sum equal to one hundred dollars per annum to the collector of taxes of the District of Columbia: *And be it further provided*, That if any person or firm shall have paid the tax in this section provided for banks and bankers, such person or firm shall not again be taxed as a broker or brokers.

Par. 16. Note brokers shall pay a tax of one hundred

dollars per annum. Every person, firm, company, or association not incorporated (except private banks and bankers) that loans money on promissory notes without real estate or collateral security or advances money on personal property as security without possession of said personal property shall be deemed a note broker: *Provided*, That exceptions shall be made of cooperative associations whose business is restricted to the members of such association.

Par. 17. The taxes for said private banks and bankers, general brokers, and note brokers shall be paid to the collector of taxes of the District of Columbia, and shall date from the first day of July in each year and expire on the thirtieth day of June following. Said taxes shall date from the first day of the month in which the liability begins, and payment shall be made for a proportionate amount.

Par. 18. Any person or persons violating any of the provisions of this section shall be liable to a penalty of not exceeding five hundred dollars for each offense, said penalty to be imposed, upon conviction in the police court of the District of Columbia, as other fines and penalties are imposed, and said court is hereby invested with jurisdiction thereof; and in default of the payment of said penalty the person or persons so convicted shall be imprisoned, in the discretion of the court, not exceeding six months.

Par. 19. That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to appoint a clerk and assistant clerk to said board of personal-tax appraisers at annual salaries of one thousand four hundred and one thousand dollars each, and three inspectors at annual salaries of one thousand two hundred dollars each, all of whom shall perform such duties as may be assigned to them by the chairman of said board; and to pay the salaries of the

two assistant assessors, the clerk and assistant clerk to said board of personal-tax appraisers, and the three inspectors aforesaid for the fiscal year beginning July first, nineteen hundred and two, and six thousand dollars for books, stationery, printing, means of transportation, and other incidental expenses, including the hire of temporary clerks, not to exceed one thousand dollars, the sum of eighteen thousand dollars is hereby appropriated.

License Taxes.

Sec. 7. That no person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license tax is imposed by the terms of this section without having first obtained a license so to do. Applications for licenses shall be made to the assessor of the District of Columbia, and no license shall be granted until payment for the same shall have been made. Every license shall specify by name the person, firm, or corporation to which it shall be issued, the business, trade, profession, or calling for which it is granted, and the location at which such business, trade, profession, or calling is to be carried on. Licenses granted under the terms of this section may be assigned or transferred on application upon the conditions applicable to granting the original licenses, and the assessor shall issue a certificate of such assignment or transfer upon the payment to the District of Columbia of a fee of fifty cents therefor. All licenses and transfers issued or granted shall be signed by the assessor of the District of Columbia and impressed with the seal of his office.

Par. 2. That when more than one business, trade, profession, or calling for which a license is herein prescribed shall be carried on by the same person, the license tax shall be paid for each such business, trade, pro-

fession, or calling: *Provided*, That licenses issued under any of the provisions of this act shall be good only for the location designated thereon, and no license shall be issued for more than one place of business, profession, or calling, without the payment of a separate tax for each: *Provided, further*, That no license shall be granted under the provisions of this section, relating to hotels and theaters, until the inspector of buildings, and the chief officer of the fire department have certified in writing to the assessor that the applicant for license has complied with the laws enacted and the regulations made and promulgated for the protection of life and property.

Par. 3. That all licenses issued shall date from the first day of November in each year and expire on the thirty-first day of October following, except as herein after provided. Licenses issued at any time after the beginning of the license year shall date from the first day of the month in which the license was issued and end on the last day of the license year above prescribed, and payment shall be made of the proportionate amount of the annual license tax: *Provided*, That in cases where the tax is less than five dollars per annum the license shall terminate one year from the first day of the month in which the license was issued.

Par. 4. That no person holding a license under the terms of this section shall willfully suffer or allow any other person chargeable with a separate license to operate under his license.

Par. 5. That all licenses granted under the terms of this section must be conspicuously posted on the premises of the licensee. Said licenses shall be accessible at all times for inspection by the police or other officers duly authorized to make such inspections. Licensees having no located place of business shall exhibit their licenses when requested to do so by any of the officers above named.

Par. 6. That no person shall set up, operate, or conduct any business or device by or in which any person, animal, or living object shall act or be exposed as a target for any ball, projectile, missile, or thing thrown or projected, for or in consideration of profit or gain, directly or indirectly.

(Paragraphs 7 to 46, both inclusive, set forth the various license taxes imposed.)

. . . . . .

Par. 47. That any person violating any of the provisions of this section shall, on conviction thereof in the police court of the District of Columbia, be punished by a fine of not more than five hundred dollars for each offense, and in default of payment by imprisonment not exceeding thirty days, in the discretion of the court, except as otherwise provided in this section.

Par. 48. That for the purposes of this section the word "person" shall signify and inclde firms, corporations, companies, associations, executors, administrators, guardians, or trustees; the word "agent" shall signify and include every person acting for another; the word "merchandise" shall signify and include every article of commerce, whether sold in bulk or otherwise; the word "dealers" shall signify and include every person engaged in selling or offering for sale any description of merchandise or property. Words of one number shall signify and include words of both numbers, respectively, and words of one gender shall signify and include words of every gender, respectively: *Provided*, That nothing in this section shall be interpreted as repealing any of the police or building regulations of the District of Columbia regarding the establishment or conduct of the business, trades, professions, or callings herein named.

Sec. 8. That all laws and parts of laws inconsistent with this act are repealed.

Approved July 1, 1902.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 268.

AUGUSTUS S. WORTHINGTON AND JOHN C. HEALD, EXECUTORS OF THE WILL OF EUGENE PETERS, PLAINTIFFS IN ERROR,

vs.

DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

ON A WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Additional Brief for Plaintiff in Error.

In another brief we have dealt with questions relating to the construction—and validity— of the Intangible Tax law of the District.

In this brief we shall consider: (1) Whether Congress under present conditions has power to tax the inhabitants of the District at all; and (2) Whether if Congress has that power it is of such extent that Congress may tax us at its pleasure and apply the proceeds of taxation to the payment of the general expenses of the Government of the United States.

I.

Congress is Without Power to Tax the Inhabitants of the District of Columbia or to Cause Them to be Taxed so Long as They are not Represented in the Taxing Body.

In dealing with the subject, we shall consider:

1. How the right of representation as a prerequisite to taxation was looked upon by the people of the American Colonies at the time of the adoption of the Constitution of the United States.

2. The proper construction in relation to taxation of those clauses of the Constitution under which Congress exercises the power of general legislation in this District.

3. The construction given to those clauses by Congress from the time when the United States took control of the District in 1801, till the year 1874.

4. The judicial decisions relating to the subject of taxation in this District.

This court will find nothing on these questions in the opinion of the Court of Appeals of the District of Columbia. When the case was first before that court we relied upon objections to the Intangible Tax Law growing out of the phraseology of that statute. But when the Court of Appeals—inadvisably as it turned out—certified some of the questions which had been discussed before it to this court, we asked that the whole case should be brought here by certiorari. When, in this situation, the case was advanced by this court and set down for hearing, we raised here, in our printed briefs, the question of the liability of the people of the District to taxation without representation. When the case was dismissed here for want of jurisdiction and again came before the Court of Appeals for hearing we submitted to that court copies of our briefs which had been prepared for use in this court and distinctly raised

and submitted the whole question of the power of Congress as to District taxation. This clearly appears from our "Memorandum in Reply," which we filed in the Court of Appeals (Rec., p. 13).

1. When the Constitution of the United States Was Adopted, it Was the Right of Every Citizen That He Should Not Be Taxed Except By His Own Consent Given in Person or Through His Representative.

That our forefathers held that "Taxation Without Representation is Tyranny," requires no citations. But to indicate the extent to which this sentiment went we submit a few examples.

The Stamp Act (5 George III, Chap. 12) was signed by the King in March, 1765. It had long before been under consideration by the Ministry of Great Britain. Regarding it, the City of Boston at its annual meeting in May, 1764, gave certain instructions to its representatives in the General Assembly of Massachusetts. In these instructions, it was said:

> "If taxes are laid upon us in any shape without our having a legal representative where they are laid, *are we not reduced from the character of free subjects to the miserable state of tributary slaves?*"
>
> Bancroft, History of the United States, Vol. 3, p. 420 (Centenary Ed., 1876).

On the 29th of May, 1765, the Virginia Assembly adopted resolutions proposed by Patrick Henry, one of which was:

> "*Resolved*, That the taxation of the people by themselves or by persons chosen by themselves to represent them who can only know what taxes the people are able to bear and the easiest mode of raising them, and are equally affected by such taxes themselves, *is the distinguishing characteristic of British freedom, and without which the ancient constitution can not exist.*"
>
> Bancroft, Vol. 3, p. 469.

In September, 1765, the town of Boston again instructed its representatives in the assembly as follows:

> "The most essential rights of British subjects are those of being represented in the same body which exercises the power of levying taxes upon them and of having their property tried by juries. *These are the very pillars of the British Constitution founded on the common rights of mankind.*"

The "Stamp Act Congress," composed of representatives of most of the colonies, which convened in New York in October, 1765, adopted resolutions, the second and third of which were as follows:

> "2. That his Majesty's liege subjects in these colonies are entitled to all the inherent rights and privileges of his natural born subjects within the Kingdom of Great Britain.
>
> "3. *That it is inseparably essential to the freedom of a people and the undoubted right of Englishmen*, that no taxes should be imposed on them but with their own consent given personally or by their own representatives."
>
> Niles Principles and Acts of the Revolution (Ed. of 1876), p. 163.

Among the most potent influences which led the colonists to resist the Stamp Act were the "Letters of a Farmer," written by the lawyer, John Dickinson, of Pennsylvania, and addressed to his fellow citizens. Franklin, who was sent to London to endeavor to prevent the passage of the Stamp Act, caused these letters to be reprinted in London, and they were translated into French and published in Paris.

Dickinson was a member of the Stamp Act Congress, and was also a member of the Constitutional Convention of 1787. The tenor of these celebrated epistles is sufficiently indicated by what he said in his Letter VII.

> "If they (Parliament) have any right to tax us, then whether our own money shall continue in our

pockets or not depends no longer on us but on them. . . . *Those who are taxed without their own consent given by themselves or their representatives are slaves.*"

In March, 1774, when the difficulties between the British Ministry and the American Colonies were flagrant, Lord Camden (then Chief Justice of the Common Pleas) in a speech in the House of Lords said:

> "My position is this—I repeat it—I will maintain it to my last hour—taxation and representation are inseparable. This position is founded on the laws of nature; it is in itself an external law of nature, for whatever is a man's own is absolutely his own; no man has a right to take it from him without his consent either expressed by himself or representative. Whoever attempts it attempts an injury; whoever commits it commits a robbery—he throws down and destroys the distinction between freedom and slavery. . . . The forefathers of the Americans did not leave their native country and subject themselves to every danger and distress to be reduced to a state of slavery. . . . In the words of Mr. Locke what property have they in that which another may by right take when he pleases himself!"

This speech of Lord Camden's was published by Dickinson in his Letter No. VIII. It will be found in full in "History of Debates and Proceedings of Parliament from 1743 to 1774," Vol. 4, pages 364-367.

Lord Chatham in the House of Lords in December, 1775, in a speech relating to the rebellion in the American Colonies said:

> "Property is in its nature single as an atom. It is indivisible, can belong to one only and can not be touched but by his own consent. The law that attempted to alter this disposed of it, annihilates it. The spirit which now resists your taxation in America is the same which formerly

> opposed, and with success opposed, loans, benevolences and ship money in England, . . . the same spirit which establishes *the great fundamental and essential maxim of your liberties* that no subject shall be taxed but by his own consent."

(This and other speeches by Pitt on the same subject are quoted by Bancroft in his History of the United States, vol. 5, pages 384 to 395, edition of 1852, Little Brown & Co.)

It can not be disputed that when the colonies established their independence it was recognized by all of them that not only is taxation without representation tyranny, but that the right to be represented before he can be taxed is a fundamental right, the deprivation of which reduces the injured person or community to a state of slavery. It was deemed to be as important and fundamental as the right of trial by jury. It was, in substance, the same as the right that private property shall not be taken for public use without just compensation.

These have been the rights of Englishmen for a thousand years. The Declaration of Independence discloses that these are among the rights to maintain which our forefathers drew the sword. And these rights existed to their fullest extent in the residents of Montgomery and Prince George's Counties when a part of each of those counties was transferred to the Federal District of the Constitution. They are today the rights of the inhabitants of this District, unless they have been voluntarily surrendered.

2. The Rights of the Inhabitants of the Federal District as to Taxation For Local Purposes Were in No Degree Impaired When They Ceased to Be Citizens of Maryland or Virginia and Became Subject Only to the Sovereignty of the United States, Under the Provisions of the Constitution.

This principle is a Chief corner foundation stone of Anglo Saxon liberty.

Cooley, Const. Lim. 7th ed. 702

In so far as the cession itself is concerned, there is no room for argument. The Act of Cession passed by the Maryland legislature expressly provided:

> "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil or to affect the rights of individuals therein, otherwise then the same shall or may be transferred by such individuals to the United States."
>
> Tindal's The City of Washington, 31,167.

A similar provision was embodied in the Virginia Act of Cession (Tindal 32). These acts and the other acts of Virginia and Maryland and the proceedings under which the transfer of the jurisdiction to the United States was completed, are set forth in Morris *vs.* United States, Potomac Flat Cases, 174 U. S., p. 196.

If the residents of the ceded territory lost their right to be represented in any body that imposed taxes on them, they lost it by virtue of some express provision of the Constitution. In the creation of that instrument they were represented by the Virginia and Maryland delegates in the Convention of 1787, and they were represented in the conventions of their respective States when Virginia and Maryland ratified the Constitution.

The express provisions of the Constitution as to taxation are as follows:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.
>
> . . . . . .
>
> "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."
>
> Art. I, secs. 8 and 9.

We make no question that the people of this District are subject to taxation by Congress under these provisions of the Constitution, as well as under the amendment giving Congress the power to impose an income tax. As to the direct tax provision, it was so held by this court in Loughborough *vs.* Blake, 5 Wheat., 317.

But obviously a different question arises as to taxation for local purposes in the District of Columbia. That depends upon the proper interpretation of paragraph 16 of Section 8, of Article I, of the Constitution, which gives Congress power:

> "To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance by Congress, become the seat of the Government of the United States and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."

There seems to be nothing in the recorded proceedings of the Constitutional Convention or in the debates in the Colonial Assemblies when the question of ratifying the Constitution was under discussion that throws any light upon the meaning given by the convention to the words "exclusive legislation" in this clause of the Constitution. It was adopted without debate.

But Madison, in discussing this provision in the *Federalist* (No. XLIII), says:

> "The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with

impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as to further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; *as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it*; *as the inhabitants* will find sufficient inducements of interest to become willing parties to the cession; as they *will have had their voice in the election of the government which is to exercise authority over them*; *as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them;* and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated."

Our claim that the right of Congress to exercise exclusive *legislation* in this District does not include the power to tax, is sustained by the history of the events which led to the independence of the Colonies and the adoption of the Constitution.

The great contention of the Colonists in their controversy with Parliament over the Stamp Act in 1765-6

was that the parliament's power to legislate for the Colonies did not include the power of internal taxation—that legislation is one thing, and taxation another.

Bancroft in his history of the United States says, "Pitt, Barre and Beckford contended that the taxation of America was against the inherent distinction between taxation and legislation which pervades modern history." Thus Pitt (not yet Lord Chatham) in his memorable speech in the House of Commons on the 14th of January, 1766, in support of the bill to repeal the Stamp Act, said:

> "It is my opinion that this Kingdom has no right to lay a tax upon the Colonies. At the same time I assert the authority of this Kingdom over the Colonies to be sovereign and supreme in every circumstance of government and legislation whatsoever. . . . *Taxation is no part of the governing or legislative power.* The taxes are a voluntary gift and grant of the Commons alone. . . . The gift and grant is of the Commons alone. . . . When . . . in this House we give and grant, we give and grant what is our own. But in an American tax what do we do? Our own property? No! We give and grant to your Majesty the property of your Majesty's Commons in America! It is an absurdity in terms. *The distinction between legislation and taxation is essential to liberty.* . . . The commons of America represented in their several assemblies have ever been in the possession of this their constitutional right of giving and granting their own money. They would have been slaves if they had not enjoyed it. Three millions of people so dead to all the feelings of liberty as voluntarily to submit to be slaves would have been fit instruments to make slaves of the rest."
>
> History of Debates and Proceedings of Both Houses of Parliament, Vol. 4, pp. 288-291.

This speech was published everywhere in the Colonies and was universally acclaimed as an accurate statement of their position. Indeed James Otis had previously used substantially the same language in his pamphlet entitled, Rights of the British Colonies. After fully admitting that Parliament was the "supreme legislative power" of the Colonies, he said:

> "The supreme power can not take from any man any part of his property without his consent in person or by representative."
>
> (Third Edition, reprinted in London, 1766, p. 55.)

And, says Bancroft, dealing with the situation in July, 1765, when the Stamp Act was in force and the Colonies were resisting its enforcement:

> "The royalists said to Otis, 'You own that parliament is the supreme legislature; will you question its jurisdiction?' And his answer was on the lips of all patriots, learned and unlearned: 'Lord Coke declares that it is against Magna Charta and against the franchises of the land, for freemen to be taxed but by their own consent; Lord Coke rules that an act of parliament against common law is void.' "
>
> (Bancroft's Hist. of the U. S., Vol. 3, p. 480 Revised Edition of 1876, Little, Brown & Co.)

Pitt's declaration that taxation is no part of the governing or legislative power was but a restatement of an ancient principle of the English Constitution.

> "In the earliest parliamentary records the lords and commons summoned in a great measure for the sake of relieving the King's necessities appear to have made their several grants of supplies without mutual communication. . . . *These were not in the form of laws*, nor did they obtain

> any formal assent from the King, to whom they were tendered in written indentures, entered afterward on the roll of parliament."
>
> Hallam's Const. History of England, Vol. 3, p. 34 (Boston, 1861 Ed.)

Hallam traces here the changes made from time to time in the form of money-bills in parliament, concluding by saying:

> "In the first parliament of Charles I, the commons began to omit the name of the lords in the preamble of bills of supply, reciting the grant as if wholly their own, but in the enacting words adopted the customary form of Statutes. This though once remonstrated against by the upper house, has continued ever since to be the practice."
>
> Pp. 35, 36.

The Stamp Act itself bears witness to the correctness of Hallam's statement on this subject. It recites:

> "The Commons of Great Britain in parliament assembled have therefore resolved *to give and grant* to your Majesty the several rates and duties hereinafter mentioned."

The Bill of Rights adopted by Parliament in October, 1689, declared:

> "4. That the laying of money for or to the use of the Crown by pretence and prerogative *without grant of parliament* for longer time or in other manner than the same is or shall be granted is illegal."
>
> Hallam's Const. History of England, Vol. 3, p. 105.

In every history of these pre-revolutionary times in America it is recorded that the colonists everywhere resisted the efforts of Parliament to tax them on the princi-

ple laid down by their champions in Parliament that taxation is not legislation.

When it became evident that the Colonies would resist by force of arms if necessary, the enforcement of the Stamp Act, Pitt in concluding another speech on the subject said:

> "Upon the whole, I will beg leave to tell the house what is really my opinion. It is that the Stamp Act be repealed absolutely totally and immediately. That the reason for the repeal be assigned because it was founded on an erroneous principle. At the same time let the sovereign authority of this country over the Colonies be asserted in as strong terms as can be devised and be made to extend to every point of *legislation* whatever. That we may bind their trade, confine their manufactures, and exercise every power whatever, except that of taking their money out of their pockets without their consent!"
>
> History of Debates and Proceedings in both Houses of Parliament, Vol. 4, page 297.

This suggestion of Pitt's was acted upon. The Stamp Act was repealed, this repeal being coupled with a resolution declaring that Parliament had the power of legislating for the colonies in all cases whatsoever (History of Debates, Vol. 4., p.). It matters not that those who favored the Stamp Act still held that the words, "in all cases, whatsover," included the power of taxation. It can not be questioned that Pitt's view was the American view on this subject. It is inconceivable that the people who from 1765 to 1783 were contending for the principle that the power to legislate does not include the power to tax should in 1787 have provided in the constitution they then framed that power to tax

without representation should be conferred upon Congress when, as to the proposed federal district, it was given merely the power to legislate.

3. The Contemporaneous Construction of the "Exclusive Legislation" Provision of the Constitution, Continued For Over Seventy Years, Demonstrates That It Was Not Held to Deprive the Inhabitants of the District of Their Right to Be Represented in Any Body That Should Be Empowered to Tax Them.

Prior to the cession of the territory comprising the original federal district, the inhabitants were taxed by their respective States and by several municipal corporations theretofore created by the States. The town of Alexandria had been such a corporation for many years. Georgetown was incorporated in 1789. That part of the ceded Maryland territory which lay outside of Georgetown was within the jurisdiction of a body composed of justices of the peace called the Levy Court, whose principle function was to construct and keep in repair roads and bridges and to take charge of paupers. A similar body exercised practically the same jurisdiction in that part of the territory ceded by Virginia which lay outside of Alexandria.

All these bodies had the usual taxing powers and all continued to exercise them after the cession.

By the act approved February 21, 1801 (2 Stats., L., 103), Congress formally assumed jurisdiction over the District. That act continued in force the laws of Virginia and Maryland respectively. It expressly provided that nothing in the act should "in any wise alter, impeach or impair the rights granted by or derived from the acts of incorporation of Alexandria and Georgetown or of any other body corporate within said District except so far as relates to the judicial powers of the corporations of Georgetown and Alexandria."

By an act approved May 3, 1802 (2 Stat., 193), Congress incorporated the City of Washington giving it the usual municipal powers, including expressly the power "to lay and collect taxes."

The powers of the Levy Court and of the corresponding body in Alexandria County were defined and continued by several Acts of Congress. Act Feb. 21, 1801 (2 Stat. 103); Act May 3, 1802 (2 Stat. 193); Act July 1, 1812 (2 Stat. 771).

From this time till 1846, when the Virginia part of the District was given back to that State, and as to the remainder of the District till 1871, the inhabitants of the District through their several municipal corporations continued to tax themselves. Changes were made from time to time in the charters of these bodies but their taxing powers it is believed remained till they were all abolished by the act of February 21, 1871 (16 Stat., 119).

That act created a municipal corporation called the District of Columbia, comprising the entire District. It provided a legislature composed of an assembly to be elected by the people, a council to be appointed by the President, and a Governor, also to be appointed by the President. In addition it created a Board of Public Works to be appointed by the President. The legislature was authorized to raise money by taxation to meet necessary appropriations.

This form of government continued till it, in turn, was abolished by the act of June 20, 1874 (17 Stat., 116), which provided for a board of three commissioners, to which board was given certain executive authority. Section 4 of the act levied a tax on the real estate in the District for the support of its government.

Section 5 of the act provided for a select joint committee "to prepare a suitable form of government for the District of Columbia," and report the same to the two Houses on the first day of the next session. The

joint committee was further instructed to submit at the same time a statement of the proper proportion of the expenses of the District Government which should be borne by the District and the United States respectively.

For the next four years the temporary form of government of the District provided by the Act of 1874 continued in existence because Congress was unable to agree to the plan proposed by the joint select committee or to any one of several other plans submitted by other committees. Finally, the Act of June 11, 1878, was passed (18 Stats., 102). It is entitled, "An Act providing a permanent form of government for the District of Columbia." It continued the government by three Commissioners to be appointed by the President, and authorized the Commissioners to apply the taxes and other revenues to the payment of its expenses. Section 4 of the act provided that one-half of the appropriations for District expenses, including interest on the bonded debt, should be paid by the United States and the other one-half out of District taxes. The act fixed the rate of taxation at $1.50 in the hundred on both real and personal property. It gave the inhabitants of the District no representation in their government and no voice or vote as to their taxation. It directed that two of the three Commissioners before their appointment should have been actual residents of the District for three years, claiming residence nowhere else.

By Section 4 it was required that all taxes collected should be paid into the Treasury of the United States to be disbursed with money appropriated by Congress for the expenses of the District. Other statutes relating to this last mentioned provision are referred to by the Comptroller of the Treasury in his opinion from which we quote on page 29 of this brief.

It was of this act that this court said in Eckloff *vs.* United States, 135 U. S., 240:

> "The court below (Supreme Court of the District) placed its decision on what we conceive to be the true significance on the act of 1878. As said by that court, it is to be regarded as an organic act, intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an act to provide 'a permanent form of government for the District.' The word permanent is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the act itself for their extent and limitations. It is not one act in a series of legislation, and to be made to fit into the provisions of the prior legislation, but is a single complete act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the constitution of the District, and its grants of power are to be taken as new and independent grants, and expressing in themselves both their extent and limitations. Such was the view taken by the court below; and such we believe is the true view to be taken of the statute."

And it was of this act that the Comptroller of the Treasury held that as to the payment of the interest on the bonds issued under it the act created a contract not only between the United States and the bondholders but between the United States and the people of the District of Columbia (20 Comptroller's Decisions, pp. 441, 467).

From the foregoing brief review of the acts of Congress from the time that it assumed jurisdiction over this district it appears:

1. That from the time of the cession till 1871, the

inhabitants of the District taxed themselves through their elected representatives, except that in that part of the territory which was not included in the municipal corporations of Washington, Georgetown and Alexandria, they were taxed by what were substantially county commissions composed of justices of the peace appointed by the President.

2. That from 1871 till 1874 they were taxed by a local legislature, one branch of which was elected by them and the other appointed by the President.

3. That from 1874 till 1878 Congress had under consideration various plans providing for a permanent form of government for the District and that meanwhile Congress regulated taxation in the District.

4. That from 1878 till 1920 one-half of the expenses of the District Government were required to be paid out of the revenues of the District produced by laws enacted by Congress and the other one-half by the United States.

Thus till 1874 the people of the District were fully protested in their right to be represented in the body that taxed them; during the next four years they were waiting for Congress to decide on their form of government; and from that time till 1920 they were amply protected from excessive or unfair taxation by the fact that for every dollar taken from them in taxes the United States was required to appropriate a dollar from its treasury, just as in regard to the taxation clauses of the Constitution, Chief Justice Marshall in Loughborough *vs.* Blake, 5 Wh., 317, said:

> "If it be said, that the principle of uniformity, established in the Constitution, secures the district from oppression in the imposition of direct taxes, it is no less true, that the principle of apportionment, also established in the Constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes."

Acquiescence in such taxation by the inhabitants of the District under these circumstances it is submitted can not be considered as binding them to continue to submit when the protection afforded them by the act of 1878 is withdrawn. That would be as illogical as to hold that they had waived their right to trial by jury because for seventeen years they did not complain that their rights in that respect were disregarded in the organization of the Police Court (Callan *vs.* Wilson, 127 U. S., 540); or to hold that the frightfully severe statute which this court (in Weems *vs.* United States, 217 U. S., 349), held to be void as inflicting cruel and unusual punishment must be enforced because it had been acquiesced in under United States control for eleven years; or to allow the federal prisons to continue to be filled with persons convicted of penitentiary crimes on prosecution by information because their right to a grand jury had been denied them by nearly all the federal courts for many years (ex parte Wilson, 114 U. S., 417).

4. As to the Decisions of This Court and the Courts of the District of Columbia, Relating to the Taxing Powers of Congress in the District.

In Loughborough *vs.* Blake, 5 Wheaton, 317, it was held that an act of Congress was valid which included the District of Columbia in the levying of a direct tax under the provisions of sections 8 and 9, of article I, of the Constitution. Chief Justice Marshall in delivering the opinion of the court said it was admitted that in legislating in its capacity as a local legislature Congress had the power of levying direct taxes.

This of course was not a decision of the court—especially as at that very time, as we have seen, the people of the District were taxing themselves and Congress had then never attempted to impose a tax on the District for local purposes.

In Gibbons *vs.* District of Columbia, 116 U. S., 404, there was involved the validity of a tax sale of land in Washington which it was claimed was exempt as church property. It was claimed by the land owner that the act of Congress imposing the tax was void because it taxed property outside of the cities of Washington and Georgetown used solely for agricultural purposes at a lower rate than it taxed other property. Mr. Justice Gray in delivering the opinion of the court said that this contention was founded on a misunderstanding of the case of Loughborough *vs.* Blake and added (page 407):

> "The point there decided was that an act of Congress, laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution, might comprehend the District of Columbia; and the power of Congress, legislating as a local legislature for the District, to levy taxes for District purposes only, in like manner as the legislature of a State may tax the people of a State for State purposes, was expressly admitted, and has never since been doubted. 5 Wheat., 317; Welch *vs.* Cook, 97 U. S., 541; Mattingly *vs.* District of Columbia, 97 U. S., 687. In the exercise of this power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

Of the two cases here cited by Mr. Justice Gray, one, Welch *vs.* Cook, merely held that an act of the District legislature exempting from taxation for ten years property used for manufacturing purposes was as to the exemption repealed by a subsequent act of Congress which levied a tax on real estate with certain exceptions, not including real estate used in manufactures. Although the other case, Mattingly *vs.* District of Columbia merely upheld the power of Congress to confirm certain

special assessments for street and sewer improvement. Mr. Justice Strong in delivering the opinion of the court took occasion to say:

> "Under the Constitution, Congress had power to exercise exclusive legislation in all cases whatsoever over the District and this includes the power of taxation. Cohens *vs.* Virginia, 6 Wh., 264."

This too was a dictum, not a decision. And Cohens *vs.* Virginia involved only certain questions of the jurisdiction of the court and the further question whether an act of Congress giving the corporation of Washington the privilege of raising money for the expenses of the city government by selling lottery tickets gave the corporation the right to force the sale of such tickets in Virginia although Virginia had made the selling of lottery tickets in that State a penal offense. There is not a word in the opinion of the court referring even indirectly to taxation in the District. In Gibbons *vs.* District of Columbia the question submitted to the Court and argued was not whether Congress had the power to tax but whether it had the right to discriminate in the rate of taxation between land and used for agricultural purposes and other land.

It is submitted that whether the power of exclusive legislation in this District conferred upon Congress by the Constitution gives to Congress power to tax us entirely in its discretion and without giving us representation in the taxing body has never been submitted to, much less decided by, this court.

More apposite than the language used by the court in any of the foregoing cases is what was said by Mr. Justice Miller in delivering the opinion of the court in Loan Association *vs.* Topeka, 20 Wall., 655, in which he referred to the statement made by Chief Justice Marshall

in McCulloch *vs.* Maryland (4 Wheaton, 431), that the power to tax is the power to destroy and said:

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. . . . There are limitations on such power which grow out of the essential nature of all free governments—implied reservation of individual rights, without which the social compact could not last and which are respected by all governments entitled to the name. . . . Of all powers conferred upon government that of taxation is most liable to abuse."

There have been several cases in this court in which it has been held that Congress has the power to authorize public improvements in the District and to cause the expense thereof to be paid in whole or in part by special assessments on the land benefited by the improvement.

Willard *vs.* Presbury, 14 Wall, 676.
Bauman *vs.* Ross, 167 U. S., 548.
Wilson *vs.* Lambert, 168 U. S., 611.
Parsons *vs.* D. C., 170 U. S., 282.

In some of these cases the justice delivering the opinion upholding the power of Congress in this regard used language that would apply to taxation in general; but there is no case we believe in which the right of Congress to levy general taxes on the inhabitants of the District has been actually in issue.

That the power to impose special assessments of this character does not include the power to levy general taxes would seem to be clear from the elaborate opinion of this court delivered by Mr. Justice Brewer in Illinois Central Railroad Company *vs.* Decatur, 147 U. S., 190.

In that case the single question was whether exemption from taxation carries exemption from special assessments for public improvements. The opinion demonstrates by

many citations as well as on principle that such an assessment is not to be classed with general taxes, and quotes from a New York case where it is said:

> "The word taxes means burdens, charges or impositions put or set upon persons or property for public uses. . . . But to pay for the opening of a street in a *ratio* to the benefit or advantage derived from it, is no burden (pp. 199, 200)."

It is respectfully submitted:

1. That the inhabitants of the American Colonies of Great Britain from 1764 to 1776, held that a people whose property could be taken from them under the guise of general taxation by a body in which they were not represented were slaves.

2. That they conceded the right of the parliament of Great Britain to make laws for their government but denied that such right of legislation embraced the right to tax.

3. That rather than give up their liberty by submitting to taxation without representation, they went to war and so achieved their independence.

4. That when they organized a government of their own and provided in the Constitution for a permanent seat of government in a district in which their Congress should have the power of "exclusive legislation" they did not intend to confer a power which they had asserted in their controversy with parliament would violate the inherent and fundamental rights of mankind and reduce to slavery those who should become subject to the exercise of such power.

5. That as Congress for more than seventy years recognized the right of the inhabitants of the District to take part in the imposition of taxes on themselves and then after four years of consideration of the best form of government for the District afforded the people

of the District ample protection from unjust taxation by assuming an equal liability for the expenses of the District Government there has been no occasion till now for the taxpayers of the District to assert their rights in this regard, and that consequently there has been no decision by this court, or by any court, which precludes them from now asking this court to determine whether they are freemen or slaves.

Considering what is going on in Ireland now it is not without interest to remember that whatever her injuries may have been she escaped the wrong under which the people of this District are suffering.

> "The English Parliament repeatedly asserted its authority over the Parliament of Ireland; but it never imposed any direct tax on the Irish people."
>
> (Lecky's England in the Eighteenth Century, Vol. 3, p. 326, Edition of 1882).

We are not for a moment claiming that the inhabitants of this District can escape taxation unless they are given representation in Congress. To give us such representation would be the simplest way out; but it is not the only way. It is not taxation that we oppose but taxation without representation. Nor are we claiming that anything like a state government is essential, or even that municipal powers should be given us again. All that is required to make taxation legal in the District is that a body of some kind having the power to regulate taxation here shall be created and that we shall be represented in that body.

II.

Even if the Inhabitants of the District of Columbia Are Not Protected by the Great Principle of the Revolution that "Taxation Without Representation Is Tyranny," the Intangible Tax Law Is Invalid Because Under the Statutes Which Were in Force When It Was Enacted, and Which Are Still in Force, All Money Raised by District Taxation Is Required to be Paid Into the Treasury of the United States to be Used, Not for Local Expenses, But As Other Treasury Funds Are Used, for the General Expenses of the Government of the United States.

The District appropriation bill, to which the Intangible Tax act of 1917 was appended, made appropriations for the payment of the expenses of the District for the fiscal year ending June 30, 1918. The official reports of the Commissioners of the District of Columbia for the fiscal years ending June 30, 1918, and June 30, 1919, disclose the following facts:

The surplus revenues of the District of Columbia in the Treasury of the United States on June 30, 1918, over and above all charges arising under appropriations for that fiscal year and unexpended balances of appropriations for previous fiscal years, was $3,280,685.46. To this sum was added the further amount of $783,-236.72, being the surplus for the fiscal year ending June 30, 1919, over and above all appropriation charges against District revenues for that year. Therefore, the total surplus to the credit of the District in the Treasury on July 1, 1919, was $4,063,922.18.

The total amount collected as tax on intangible property under the act of 1917 for the fiscal year ending June 30, 1918, was $823,146.45. For the fiscal year 1919, it was $822,292.70.

It will be seen that nearly all the money collected from the taxpayers of the District on their intangible

property has gone into the District "surplus" in the Treasury.

No statute or regulation pursuant to statute limits in any way the power of Congress as to this surplus. It has become a part of the general fund, and Congress uses it accordingly.

This seems to be a startling proposition, but it is not a new one. Witness the following extracts from the debate in the Senate on the District appropriation bill on July 28, 1916—five days before the act of 1916 first taxing intangibles in the District was added to the District appropriation bill in the Senate. The pages refer to 53d Congressional Record, part 12:

> Mr. WORKS: The money which has already been contributed by the District of Columbia and not expended belongs to the Government without any question. . . . There is no way by which the District can make any demand upon the Government for the repayment of the money they have paid under legal taxation. (11736.)
>
> . . . . . .
>
> Mr. BRANDEGEE inquired whether the General Government could take moneys collected from the District and appropriate them to other than District purposes. Thereupon this colloquy followed:
>
> Mr. STERLING: I should like to ask the Senator (Works) a question. Suppose under the present system—the half-and-half system—the District of Columbia should raise by taxation more than one-half, or its share of the expenses of the District, could Congress without any reference to the District of Columbia appropriate the money——
>
> Mr. WORKS: Undoubtedly.
>
> Mr. STERLING: To whatever uses it pleased?
>
> Mr. WORKS: Oh, no; not to any uses.
>
> Mr. STERLING: Outside of the expenses of the District?

Mr. WORKS: I think there may be some trust character imposed by which the Government would be under obligation to apply it to the expense of carrying on the District, but that the Government could keep it all I have no doubt whatever.

Mr. STERLING: If the Government did not apply it to the expenses of the District of Columbia, the District would have a right of action, would it not?

Mr. WORKS: I do not know whether it would or not. I think it quite doubtful under the law. It is a very peculiar law, a very peculiar condition of things.

Mr. STERLING: If the District can sue and be sued, it would seem that that might follow.

Mr. WORKS: It might sue and not maintain the action.

Mr. BRANDEGEE: A sovereign State can not sue the General Government.

Mr. STERLING: That is true. (11737.)

. . . . . .

Mr. CHILTON: Is the money collected from the District of Columbia legally District money? Not at all. It is all paid into the Treasury of the United States; it is the money of the United States, and it goes into the Treasury as does any other money. (11744.)

. . . . . .

Mr. CHAMBERLAIN: Under this bill [repealing the half-and-half provision] as it stood when it reached the Senate the citizens of Washington would be deprived of the last vestige of participating and governing themselves which remains to them under the operations of the organic act. It virtually fixes the tax rate and governs the assessment and thereby mulcts the District in a certain sum of tax money and then sweeps that money into the Treasury of the United States to be classes as Federal funds, and to be expended with just so much of additional revenue as one Congress after another may see fit to appropriate.

It is the last word in taxation without representation. . . .

Every dollar that can be wrung from him (the District taxpayer) by an increased rate or increased assessment, or both, or by the imposition of new and strange forms of taxation, will have the effect of reducing the amount of money paid by the United States and the Federal contribution. It puts a premium upon increasing the District tax revenues. (11761.)

. . . . . .

Mr. KENYON: I wish to ask the Senator where the situation arises that the amount from taxation in the District is more than one-half . . . what is done with that excess?

Mr. WORKS: It simply remains in the Treasury of the United States Government to be dealt with as the Government may choose. . . .

If the taxpayers have paid in more than one-half of the amount, then the Government appropriates to its use the balance of the money that has been collected in that way, which is a distinct violation of the statute and an injustice to the taxpayers of the District. (11914.)

. . . . . .

Mr. WORKS: Let me read from the statement made by Mr. Brownlow, one of the Commissioners of the District, before the Joint Committee on Fiscal Relations, who dealt directly with the question and who spoke from knowledge and experience. . . .

"Every cent collected from the taxpayers of the District of Columbia goes into the Treasury to the credit of the United States; there is no account of the District of Columbia in the Treasury Department; and Congress is at liberty to do with the moneys collected from the taxpayers of the District anything it may do with the money collected from the custom houses or the offices of the internal revenue collectors anywhere in the Republic."

In making this statement, Mr. Brownlow had in mind the following correspondence.

In February, 1908, the Commissioners of the District, in writing, requested the Secretary of the Treasury to be caused to be opened on the books of the Treasury Department with the District of Columbia a separate trust fund account, to be denominated the "General Revenue Fund, District of Columbia."

As a ground for this request the Commissioners said that the District, as a municipal corporation, is entitled to all the guaranties of the Constitution respecting life, liberty and property, and such guaranties are equally for the benefit of its citizens as for those of the several States.

The Secretary referred this communication to the Comptroller of the Treasury for his "review and opinion." In his reply, dated April 3, 1908, the Comptroller reviewed at great length the legislation of Congress governing the fiscal relations between the United States and the District of Columbia, and concluded by saying:

> "The United States has absolute control and power of disposition of all the revenues of the District of Columbia, and the acts of Congress cited and quoted from shows that it is exercising such power of disposition and control. All that the various acts indicate is that the relation of debtor and creditor shall be created between the United States and the municipal corporation of the District of Columbia in the disposition of such revenues. It does not assume the attitude of trustee for said corporation as to such revenues. The account should not therefore be kept on the books of the Treasury as a trust-fund account. Neither are the revenues received from taxation or otherwise in the District of Columbia required to be kept on the books of the Treasury as a special fund. The act of July 9, 1886, *supra*, provides that all revenues as received shall be

> credited to 'said District as such on the books of the Treasury.'
>
> "This indicates that the account with the District of Columbia is to be kept as a personal account between the United States and the District of Columbia, and that all revenues received shall be treated as payments on account and credited to the District as such." (Decisions of the Comptroller of the Treasury, Vol. 14, p. 646.)

That there may be no misunderstanding as to just what this decision by the law officer of the Treasury Department means we quote this paragraph from page 661:

> "The Municipal Corporation of the District of Columbia being the mere agent of the United States . . . it exercises only such powers as are conferred on it, and these do not include any proprietary interest in the revenues arising from taxes and other sources in said District except in so far as Congress chooses to recognize such right."

Thus, while the act of 1878 required the United States to pay one-half the District expenses, Congress collected from the inhabitants of the District millions of dollars more than the District's one-half of those expenses, and claimed and exercised the power—and still claims the right—to use this so-called surplus fund for general governmental purposes. And for this wrong there is no redress, other than by action by the individual tax payer. How futile is the suggestion made in the debate in the Senate that the District might sue the United States to get these millions back is apparent when it is remembered that the District of Columbia as a municipal corporation, in all it does, acts merely as the agent of the United States; that it would be absurd for the agent to sue the principal to recover

money which the agent has itself taken from the inhabitants of the District at the command of its principal; that if the District should have the right to sue a judgment would be worthless unless the United States saw fit to pay it; and that if it were paid the law would require the District to immediately deposit the amount collected in the Treasury subject to the control of Congress.

That is the intention of Congress to keep this so-called surplus fund without regard to any interest the people of the District may imagine they have in it, plainly appears from recent legislation.

The Act of Congress approved June 5, 1920, making appropriations for the fiscal year ending June 30, 1921, contains the following opening provisions:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That 40 per centum of the following sums, respectively, is appropriated out of any money in the Treasury not otherwise appropriated, and 60 per centum out of the revenues of the District of Columbia, in full for the following expenses of the government of the District of Columbia for the fiscal year ending June 30, 1921, only, namely:
>
> "Appropriations for the fiscal year ending June 30, 1921, heretofore or hereafter made in other acts and chargeable in any proportion against the revenues of the District of Columbia, shall be paid in the proportions of 40 per centum from the Treasury of the United States and 60 per centum from the revenues of the District of Columbia.
>
> "If the estimated net revenues of the District of Columbia for the fiscal year ending June 30, 1921, are not sufficient to meet the proportion of the appropriations for that fiscal year charged against such revenues by this and all other acts, or which may be estimated to be charged against such revenues by acts that may be approved

> during such fiscal year, the Commissioners of the District of Columbia shall increase the rates of taxation on real estate and tangible personal property sufficiently to make up the difference: *Provided, however,* That such rates of taxation shall in no event be less than 1½ per centum nor more than 2 per centum."
>
> Act of June 5, 1920.

In pursuance of the authority conferred upon them by the foregoing act the Commissioners on the 26th day of June, 1920, made and published the following order:

> "That pursuant to the provisions of the act of Congress approved June 5, 1920, entitled 'An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1921, and for other purposes,' the rate of taxation on taxable real estate and tangible personal property for the fiscal year ending June 30, 1921, is hereby fixed at $1.95 on each $100.00, respectively, of the assessed valuation thereof."

A similar statute applies to the fiscal year ending June 30, 1922, and a similar order has been made by the Commissioners except that the additional levy for that year is only 35 cents, or $1.85 in all.

It will be seen that, by these proceedings, the so-called surplus fund of the District in the Treasury of the United States is ignored. The additional levy of 45 or 35 cents on the real property and tangible personal property of the District will produce a sum far less than the amount of that surplus. Thus Congress exercises the power claimed for it by taking over about four million dollars taken from the people of the District by taxation, leaving that sum in the Federal Treasury to be used to pay the expenses of the General Government.

Indeed, there is now pending in a committee of

conference of the two houses of Congress a bill which has passed the House, which provides that, in the future, Congress shall tax the inhabitants of the District in whatever sum it deems proper; that all the proceeds of such taxation shall be turned into the public treasury, and that the expenses of the District shall be paid by the Government. The tax legislation of the last two years above referred to has been the result of a compromise between those who favor this plan and those who have stood out for the continuance of the so-called half and half plan. It has been openly stated in each house of Congress by supporters of the new plan that, under it, *all* the expenses of carrying on the District government can be collected from the taxpayers of the District. We refer to this pending bill simply as showing, with that referred to above, that Congress claims and exercises the power to tax us without reference to District expenses. The more we are required to pay the less the United States must contribute. We are taxed not only without representation, but by those who are directly interested in getting as much as possible from us. If this be in accordance with the Constitution of the United States, so that we have no remedy in this tribunal, we are in worse condition than if our taxation was regulated by the British Parliament. Even the Stamp Act provided that the money raised by the sale of stamps should be applied to the payment of the expenses of the Colonies.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 268.

AUGUSTUS S. WORTHINGTON AND JOHN C. HEALD,
EXECUTORS OF THE WILL OF EUGENE PETERS, PLAINTIFFS,

vs.

DISTRICT OF COLUMBIA, DEFENDANT.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement of the Case.

This is an action of assumpsit brought by Augustus S. Worthington and John C. Heald, residents of the District of Columbia, as executors of the will of Eugene Peters, deceased, in his lifetime a resident of the District of Columbia and legally adjudged to be a lunatic by the Supreme Court of the District of Columbia, to recover a tax upon the intangible property belonging to the said lunatic, levied under the Act of March 3, 1917 (39 Stats., 1104, 1146), and paid under protest to the District of Columbia, with notice

that a suit would be brought to recover the said tax as illegally exacted (Record, p. 6). The Act of 1917 is an amendment to the Personal Tax Law of the District of Columbia of July 1, 1902 (32 Stats., 617), as amended by the Act of April 28, 1904 (33 Stats., 563). The declaration consists of the common counts supported by a bill of particulars which gives a list of the intangibles owned by said Peters, made under oath by his committee. (See Record, pp. 3, 4, and 5.) A motion to dismiss, equivalent to a demurrer, was made by the defendant and sustained by the Supreme Court of the District of Columbia, where the action was taken. An appeal was taken by the Peters committee in the Court of Appeals in the District of Columbia, which, without deciding any of the questions raised, certified the case to this Court upon inquiries propounded as to the constitutionality of the law. This Court dismissed the case for want of jurisdiction, holding in effect that the case was improperly certified to this Court, under section 251 of the Judicial Code, as a writ of error would lie to this Court from the Court of Appeals under section 250. That court, on January 3, 1921 (Record, p. 18) affirmed the judgment of the Supreme Court of the District and held substantially that the appellants had not "brought themselves within the class as to which the Act, if given one interpretation, is void; they are residents of the District and the property taxed is within the District and hence clearly subject to the provisions of this law" (Record, p. 17). Thereupon a writ of error issued to remove the case to this Court.

Such portions of the Act of July 1, 1900, and the amendment thereto of April 28, 1904, and the intangible tax provision of 1917 are set forth in the appendix hereto.

ARGUMENT.

I.

The plaintiffs in error have not brought themselves within any of the classes to which the provisions of the law claimed to be invalid apply.

It was contended on behalf of the District in the court below, and in this Court upon the first argument, that all of the questions raised are moot questions so far as the said Peters, his committee, or executors are concerned. Peters was a resident of the District of Columbia; also his executors. The intangibles taxed are situated in the District of Columbia, and none of these intangibles belongs to the class claimed to be exempt from taxation under the law, or falls within any of the provisions of the law claimed to be invalid.

The power to tax property within the jurisdiction, whether tangible or intangible, of residents cannot be denied. That is really the only question before the Court. The other questions raised by plaintiffs in error are not questions which directly touch him or his property; therefore they do not arise in this case. The case was disposed by the court below on this point, and recent decisions in this Court amply sustain that position.

These cases are—

Plymouth Coal Co. *vs.* Pennsylvania, 232 U. S., 544, 545, was an attack upon the constitutionality of the law of Pennsylvania requiring pillars of coal to be left between adjoining lines in case either should be abandoned and filled with water. The court said:

> "We may once more repeat, what has been so often said, that one who would strike down a State statute as violative of the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Federal Constitution *Southern Railway Co. v. King,* 217 U. S., 524, 534; *Standard Stock Food Co. v. Wright,* 225 U. S., 540, 550; *Rosenthal v. New York,* 226 U. S., 260, 271).
>
> "It is to be presumed, until the contrary appears, that the administrative body would have acted with reasonable regard to the property rights of plaintiff in error; and certainly if there had been any arbitrary exercise of its powers its determination would have been subject to judicial review. *Lieberman v. Van De Carr,* 199 U. S., 552, 562; *Bradley v. Richmond,* 227 U. S., 477, 483."

Jeffrey Manufacturing Company vs. Blagg, 235 U. S., 571, 576, was an attack upon the Workmen's Compensation Act of Ohio. The court said in that case:

> "For it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway v. King,* 217 U. S., 524, 534; *Engel v. O'Malley,* 219 U. S., 128, 135; *Standard Stock Food* Co. *v. Wright,* 225 U. S., 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.,* 226 U. S., 217, 219; *Rosenthal v. New York,* 226 U. S., 260, 271; *Darnell v. Indiana,* 226 U. S., 390, 398; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S.,

531, 544; *Missouri, Kansas & Texas Ry. v. Cade,* 233 U. S., 642, 648."

Mallinckrodt Works *vs.* St. Louis, 238 U. S., 41, 54, was an attack upon the constitutionality of the statute of Missouri requiring corporations to file annually an affidavit of non-participation in trusts and combinations. The court said,

> "As has been often pointed out, one who seeks to set aside a State statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. *Plymouth Coal Co. v. Pennsylvania,* 232 U. S., 531, 544, and cases cited.
>
> "And it is to be assumed, in the absence of any construction of the statute by the courts of the State, that those courts will adopt such a construction as will render the enactment consistent with constitutional limitations. *Bachtel v. Wilson,* 204 U. S., 36, 40."

In Thomas Cusack Company *vs.* City of Chicago *et al.,* 242 U. S., 526, 530, the question was raised of the validity of the ordinance of the city relating to bill posting. The court said:

> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler vs. Judges of Registration,* 179 U. S., 405; *Plymouth Coal Co. v. Pennsylvania,* 232 U. S., 531."

Arkadelphia Co. *vs.* St. Louis S. W. Ry. Co., 249 U. S., 134, 149, was brought to test the validity of interstate

freight and passenger rates prescribed by the State Railroad Commissioners of Arkansas. The court said:

> "It is most thoroughly established that before one may be heard to strike down State legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. v. Pennsylvania,* 232 U. S., 531, 544; *Jeffrey Mfg. Co. v. Blagg,* 235, U. S., 571, 576; *Mallinckrodt Works v. St. Louis,* 238 U. S., 41, 54; *Cusack Co. v. Chicago,* 242 U. S., 526, 530.
>
> "*Lake Shore & Michigan Southern Ry. Co. v. Smith,* 173 U. S., 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. *Louisville & Nashville R. R. Co. v. Kentucky,* 183 U. S., 503, 511; *Pennsylvania R. R. Co. v. Towers,* 245 U. S., 6."

The Employers' Liability Cases, 207 U. S., 463, relied on by the appellants to sustain their right to attack the validity of this statute, it will be recalled, was an attack made by a carrier which was engaged in both intrastate and interstate commerce, and therefore entitled to raise questions pertaining to those operations.

Other cases passing upon the right of a petitioner to question the validity of provisions of a statute which do not affect him are Tyler *vs.* The Judges, 179 U. S., 405, 409; Tucker *vs.* Burr, 194 U. S., 415, 419; Hatch *vs.* Reardon, 204 U. S., 152, 160; Railway *vs.* King, 217 U. S., 524, 534; Standard Stock Food Co. *vs.* Wright, 225 U. S., 540, 550; Rosenthal *vs.* N. Y., 226 U. S., 260, 271.

In Hatch *vs.* Reardon, which was a case involving a tax on transfers of corporate stock under the laws of New York, this Court said (pp. 160-1):

> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. Albany County *v.* Stanley, 105 U. S., 305, 311; 26 L. Ed., 1044, 1049; Clark *v.* Kansas City, 176 U. S., 114, 118; 44 L. Ed., 392, 396; 20 Sup. Ct. Rep., 284; Lampasas *v.* Bell, 180 U. S., 276, 283, 284; 45 L. Ed., 527, 530, 531; 21 Sup. Ct. Rep., 368; Cronin *v.* Adams, 192 U. S., 108, 114; 48 L. Ed., 365, 368; 24 Sup. Ct. Rep., 219). If the law is valid when confined to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails. With regard to taxes, especially, perhaps it might be assumed that the legislature meant them to be valid to whatever extent they could be sustained, or some other peculiar principle might be applied. (See, *e. g.*, People's Nat. Bank *v.* Marye, 191 U. S., 272, 283; 48 L. Ed., 180, 186; 24 Sup. Ct. Rep., 68."

See also District of Columbia *vs.* Brooks, 214 U. S., 138, 152; Farmers' Bank *vs.* Minn., 232 U. S., 516, 530; District of Columbia *vs.* Green, 29 App. D. C., 296, 299.

II.

Whether the phrase "engaged in business within said District" is an attempt to tax non-residents on their entire business or their entire money and credits, wherever situated, and whether the State or municipal bonds are taxable.

a. "Business within said District."

It will be observed that this act is an amendment to section 6 of the act of July 1, 1902, constituting the personal-tax law for the District of Columbia (32 Stat., 617). The amendment provides that intangibles "shall be scheduled and appraised in the manner provided by paragraph 1 of said section 6 for listing and appraisal of tangible personal property and assessed at their fair cash value," etc. Under section 6 (see appendix) the board of personal-tax assessors are directed to, "under the direction and supervision of the assessor, *assess personal property in the District of Columbia* as follows," etc. In construing, therefore, the phrase of the amendment as to what money or credits or business of a non-resident is taxable under it, we are limited by the provision of the amended act to "personal property in the District of Columbia." This construction has been uniformly the one adopted by those charged with the enforcement of those acts.

Later in the same paragraph it is provided:

> "Every person, association, corporation, firm, or company *in said District liable to taxation here-*

under, and every association, company, executor, administrator, guardian, or trustee holding personal property in trust liable to taxation hereunder SHALL" make the return, under oath, required by the statute.

It will be noticed that the phrase "liable to taxation hereunder" occurs twice. This might well be taken as an indication that Congress had in mind that there existed persons and property that might not be subject to "taxation hereunder," and this is fortified by the fact that the act itself carries its own exemptions as to persons and property (par. 9).

Again, in paragraph 5 of the act of 1902, as amended by the act of April 19, 1904 (33 Stat., 564), the tax on street-railroad companies is limited to their "gross receipts in the District of Columbia," because of the well-known fact that some of the street railroads derive receipts from business outside of the District. Again, in paragraph 6, the tax on fidelity companies, which are known to operate within as well as without the District, the tax is laid upon "their gross receipts in the District of Columbia." The inference is fairly clear from these provisions that when Congress taxed corporations doing business without as well as within the District the tax should be confined to business within the District. It might be contended, also, that as to property or business outside of the District a protesting person or corporation would not be a person or corporation "engaged in business within said District" for the purpose of taxation. A strictly grammatical construction of the act of 1917, read by itself, might make him so, but a legal interpretation, in the light of previous legislation, would have the opposite result, as the taxing officers claim it does here.

Non-residents usually pay taxes upon their money, credits, stocks, bonds, etc., at the place of their domicile upon the principle of "*mobilia sequuntur personam.*" That it was not the intention of Congress to tax non-residents upon property not within the District is shown by what is said above and further by paragraph 3 of the Act of 1902, requiring persons entering the District of Columbia in the middle of a tax year to pay a tax for the remainder of that year upon the merchandise so brought in, and also by the amendment of 1913 to paragraph 10 of the Act of 1902, providing that "household and other belongings not held for sale and owned by any person in the public service temporarily residing in the District of Columbia who is a citizen of any State or Territory and who is taxed on such personal property in such State or Territory" shall be exempt from taxation.

The construction expounded is not a reasonable one and is one which would make the act invalid, a result to be avoided if possible, if there be another and reasonable interpretation which would permit the act to stand. U. S. *vs.* Del. & Hudson Co., 213 U. S., 366; Lansburgh *vs.* District of Columbia, 11 App., D. C., 512, 527; Chapman *vs.* U. S., 5 App., D. C., 122, 131. In Kentucky a tax law couched in general terms was confined to money arising from business done by an agent within the State. Com. *vs.* Ins. Co., 149 Ky., 380. In that case a statute taxed all real and personal property within the State and the personal estate of all residents. It was held that a non-resident doing business in the State was taxable on the accumulations or income arising from the business, but not upon property brought temporarily within the State.

While a State may not tax property beyond its jurisdiction or burden interstate commerce in any form, yet it may impose a tax on "the privilege of being a corporation" (Kansas City *vs.* Kansas, 240 U. S., 227, 232), although part of the capital measuring the tax is without the State; also Maxwell *vs.* Bugbee, 250 U. S., 525. A tax on income of a domestic company may include profits from interstate commerce. U. S. Glue Co. *vs.* Oak Creek, 247 U. S., 321.

b. It is argued, also, that the law is void because "it attempts to tax the bonds and other securities of the States and other municipal corporations."

This is a rather extravagant statement. Neither States nor municipalities are mentioned in the statute. It is couched in general terms, as such statutes usually are; and if the rule insisted on by the appellants should prevail, many tax laws of the District of Columbia, and probably in the States, would be void. It is sufficient to say, perhaps, that no tax has ever been collected on such bonds, and no case has been cited by the appellants in which the application of the rule as stated by them has destroyed a tax law.

Neither does the act provide that Government securities shall be exempt, although such securities were made exempt by the law of their issuance. Applying plaintiffs' argument, the law would be invalid for this reason alone. Further, the law of 1902, taxing tangible property, makes no exemption of Government property. Applying plaintiffs' argument again, that law would also be invalid. Further, in none of the laws relating to the taxation of real estate in the District of Columbia is there any exemption of the

property of the United States, except in the single case of the Act of June 20, 1874 (18 Stat., 116); there are none in any of the laws passed since that date. (See Acts of March 3, 1877, 19 Stat., 396-402; June 11, 1878, 20 Stat., 102-108; July 1, 1902, 32 Stat., 590-629.) These laws carry their own exemptions, and, pursuing this reasoning, are also void because of the attempt to tax Government property. Neither is there any exemption of the property of foreign governments or their ambassadors. If, however, any attempt should be made to tax the property of the United States, real or personal, or that of any foreign government or its ambassadors, the courts would have no difficulty in determining that such taxes would not lie "by the application of principles long established." Farmers' Bank *vs.* Minn., 232 U. S., 516, 521. The argument, in short, proves too much.

The case of Farmers' Bank *vs.* Minn., 232 U. S., 516, cited by appellants to sustain the alleged rule, is a strong argument against it. There the State sought to tax the bonds of municipalities in Indian Territory and the Territory of Oklahoma held by the bank under a law taxing the surplus as credits and to be ascertained by "deducting from its assets (other than real estate, which is separately assessed) the amount of the deposits and of all other accounts payable" (pp. 520, 521). There was no exemption of municipalities; had there been, the case could not have arisen; but it appears plainly from the opinion (p. 529) that the tax on the surplus was sustained as to the inclusion within the surplus of $161,000 secured by mortgages on Minnesota real estate. The court did not hold the law invalid, but said that "by the application of principles long established" (p. 521) such bonds could not be taxed by the State. It is also significant

that the court said (p. 530) that if there were no discriminations against saving banks, to which class the plaintiff belonged, it would not inquire "whether the act discriminates against other banks and trust companies."

This Court has had occasion to construe words of general import and has generally construed them so as to confine the operation of laws within constitutional limitations unless the wording of the law was such as to prevent such a construction, as in the Employers' Liability Cases, 207 U. S., 463, where such a construction destroyed another and important part of the law. There the court was asked to read a limitation into the law which would destroy it in another important particular. That is not the case here. When the question arises, and it does not arise upon the facts presented here, the court will only be asked to sustain the municipal officers in their interpretation, which is a reasonable one and one within constitutional limits. In other words, the court will merely be requested to apply the elementary principle that where there are two constructions open, one of which will destroy and the other save the law, the court will adopt that interpretation which will save the law unless the language be so plain as to make the other course necessary. It is believed to be the settled doctrine that where laws are couched in general terms the courts will confine their operation within constitutional limitations. United States *vs.* Palmer, 3 Wheat., 610, 631.

> "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the State, but also to those objects to which the legislature intended to apply them."

This was a case construing the old statute against piracy, and was limited in its applications to vessels of the United States (p. 633, Marshall, C. J.).

In Carlisle *vs.* United States, 16 Wall., 147, 153, construing the general amnesty proclamation following the civil war, the court said:

> "All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature" (p. 153, Field, J.). To the same effect is United States *vs.* Kirby, 7 Wall., 482, 486-7.

In Petri *vs.* Commercial Bank, 142 U. S., 644, 650, the question arose whether a national bank could bring a suit in the United States circuit court where the defendant resided against a citizen of another State on the ground of diverse citizenship. The court said, page 650 (per Fuller, C. J.):

> "The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the legislature from the words used and the subject-matter to which the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. Brewer's Lessee *vs.* Blougher, 14 Pet., 178; Market Co. *vs.* Hoffman, 101 U. S., 112, 115."

See also Waters-Pierce Oil Co. *vs.* Deselms, 212 U. S., 159, 173, in which a statute of Oklahoma was held to mean exactly the opposite of what the grammatical construction called for, because of the fact that the "words of the statute are somewhat confusedly expressed" (p. 173) in prescribing tests for inflammable oils.

In the case of the State Tax on Foreign-held Bonds, 15 Wall., 300, there was drawn in question the validity of the Pennsylvania tax of 5 per cent on the interest of bonds held by non-residents. The law was not held to be invalid *in toto,* but only its operation beyond the State. The court said, page 326:

> "The extraterritorial invalidity of State laws * * * must * * * attend State legislation which seeks to change the obligation of such contracts in any particular,"

i. e., the contract between the corporation and the bondholder for the payment of interest. This decision followed R. R. *vs.* Jackson, 7 Wall., 262, 269:

> "The decision was placed mainly on the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent to impose an income tax on non-resident aliens."

This case arose over an attempt to collect an income tax from non-resident aliens under the Act of June 30, 1864, which taxed the income of "every person residing in the United States, or of any citizen residing abroad" (pp. 263, 269).

Guy *vs.* Baltimore, 100 U. S., 434, 443, 444, is another case resembling very closely in principle the case at bar. Acting under authority of the legislature, the city of Baltimore had passed an ordinance requiring special wharfage fees to be paid by vessels unloading articles "other than products of the State of Maryland."

On page 439 of the opinion the court approves what it had said in Ward *vs.* Maryland, and adds this language:

> "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes, than it imposes upon the like products of its own territory."

The court said at the conclusion of the opinion that the statute of Maryland was in conflict with the power of Congress over commerce "in the respect adverted to."

> "Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a district subject may be invalid." Field *vs.* Clark, 143 U. S., 649, 696-7.

One provision of a section may be invalid without affecting the rest of a section, just as one section may be invalid without affecting the rest of the law. Berea College *vs.* Ky., 211 U. S., 45, 55; Loeb *vs.* Tp. Trs., 179 U. S., 472, 490.

The complaint against the law because of alleged excessive penalties will be examined when an attempt is made to en-

force such penalties. West. Un. *vs.* Richmond, 224 U. S., 160, 172.

St. Louis S. W. Ry. *vs.* Ark., 235 U. S., 350, 369, 370.

Presser *vs.* Ill., 116 U. S. 252, 269.

> "Every reasonable construction must be resorted to in order to save a statute from unconstitutionality." Hooper *vs.* Cal., 155 U. S., 648, 657.

Neither is it believed that the decision in the Income Tax cases (158 U. S., 601, 635-637) is applicable to the present situation. There the tax was sought to be imposed upon income, a radically different status.

III.

Petitioners claim that the law is invalid because of the exempting clause, "nor to shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege."

This part of the law is copied from paragraph 8, section 6, of the Act of July 1, 1902 (32 St., 617), imposing a tax upon tangible personal property. Paragraph 5 of that law taxes banks, trust companies, gas, electric lighting, telephone companies, and street railroads. These corporations, receiving special franchises, are taxed at a much higher rate than individuals, and it was therefore entirely proper and just that they should not be subjected to a further tax on either tangibles or intangibles. Paragraph 6 deals with fidelity and guaranty companies. Paragraph 7 with savings banks having no capital stock. Paragraph 8 deals with ordinary

business companies "which by reason of or in addition to incorporation receive no special franchise or privilege," and they are, accordingly, taxed as are individuals.

There has been no difficulty in the practical application of this feature in either the tangible tax of 1902 or in the law under consideration. Corporations know, or ought to, whether their charters give them special franchises or not, and return their taxes accordingly. The municipal officers have had no trouble with this feature of the law, and the difficulties apprehended by counsel for plaintiffs are purely imaginary, or, at best, they are yet to arise.

This is not a penal law, and the doctrine of strict interpretation does not apply. It is true that tax laws are construed in favor of the citizen and against the Government; but, when a citizen comes fairly within the class taxed, the same rule of strict interpretation applies against him and in favor of the Government. The plaintiffs fall clearly within the class taxed and as to the subjects taxed.

In passing upon certain sections of the Act of 1902, the Court of Appeals said (D. C. *vs.* Fickling, 33 App., 371, 374):

> "Paragraphs 11 and 13 are provisions of a general revenue act. It is well settled that such acts are to be liberally construed for the purpose of carrying out the intention of the legislature, notwithstanding a penal clause, usual in all such enactments in respect of licenses, for the purpose of securing prompt and effective enforcement.
>
> United States *vs.* Hodson, 10 Wall., 395, 406; 19 L. Ed., 937, 939.
>
> United States *vs.* Stowell, 133 U. S., 1, 12; 33 L. Ed., 555, 558; 10 Sup. Ct. Rep., 244.
>
> Lauer *vs.* District of Columbia, 11 App. D. C., 453, 457."

The clause in question is found among the exemption clauses of the law, and applies to those *corporations* which do not enjoy special privileges, as distinct from those already heavily taxed, or at least taxed largely in excess of the rate imposed upon individuals (par. 5, Act of 1902), and which it was not the purpose of the law to tax again. That this is so, appears from the language:

> "Nor shall the provisions of this act apply to *life or fire insurance companies* having no capital stock, nor to the shares of stock of *business companies* which by reason of or in addition to incorporation receive no special franchise or privilege, but *all such corporations* shall be rated, assessed and taxed as individuals conducting business in similar lines are rated, assessed and taxed."

Then follows the exemption of companies which have been taxed as enjoying special privileges, above referred to.

It may be noted here that the act begins with a general taxing clause imposing a tax upon "money and credits, including moneys loaned and invested, bonds and shares of stock * * * of any person, firm, association, or corporation resident or engaged in business within said District." Then follows the exemption clause:

Saving deposits not exceeding $500.

Exemption of bank notes and discounts, etc.

Exemption of saving institutions, building associations, and various benefit societies.

Life and fire insurance companies having no stock.

Business companies not enjoying special privileges or franchises—assessed as individuals.

Exemption of companies liable to taxation on capital stock or earnings.

The fact that it may be difficult to ascertain, if it be a fact—which is not conceded—what companies enjoy special privileges or franchises is not an argument against the constitutionality of the law.

Congress may make such distinction between various corporations under its power to legislate for the District. In Gibbons *vs.* District of Columbia, 116 U. S., 404-408, the court said, in referring to the question of taxation: "In the exercise of this power Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion exempt certain classes of property from taxation or may tax them at a lower rate than other property." It is not perceived how the fact that some corporations are taxed and some exempted can avail the plaintiff. The true test of a discrimination in the legal sense would be, Are other individuals in the same class with the plaintiff taxed at a different rate or exempt from tax upon the same class of property on which he is asked to pay the tax in this case?

It has been suggested that the foregoing exemption applies to non-residents as well as resident companies. Congress, however, was speaking of corporations "organized in the District of Columbia or under the laws of any of the States or Territories of the United States chiefly for the purpose of and transacting business within the District of Columbia," and provided that all such corporations should be taxed as individuals in similar lines of business. Moreover, this exemption relates to the exemption of certain corporations from taxation and not to the exemption of individuals, who are not concerned with this classification.

Generally it is not perceived why Congress has not the absolute authority in passing a tax law for the District of Columbia to make a distinction between individuals and corporations, and as to the latter to make further distinctions, nor why it could not exempt from taxation certain corporations or associations of a mutual or fraternal or beneficial character and legally impose a tax upon ordinary business corporations as upon individuals.

It may be that these stocks are taxed twice; but, as pointed out in Kidd *vs.* Ala., 188 U. S., 730-732, the fact that the stock is taxed elsewhere is not a tax, so far as the District is concerned.

Of special interest in connection with the question under discussion, and in connection with the rule of construction which saves parts of statutes as valid when the courts find it necessary to declare other parts invalid, are the following cases:

Huntington *vs.* Worthen, 120 U. S., 97. Under the constitution of Arkansas all the property in the State was taxed; but under an act passed in 1883 the legislature attempted to exempt from taxation embankments, tunnels, cuts, ties, trestles, and bridges (page 99). The court declared this provision of the statute in conflict with the constitutional provisions and therefore void. The court upheld the act declaring that attempted exemption only was void (page 102).

In the case of State Freight Tax, 15 Wall., 232, the court declared invalid part of the statute of Pennsylvania which in its terms was broad enough to tax interstate commerce, but sustained the act so far as it applied only to *instra*state matters (page 282).

In the case of the Diamond Glue Company *vs.* The U. S. Glue Co., 187 U. S., 611, the court upheld the statute of Wisconsin requiring foreign corporations to file copies of their charges before doing business in that State. This is also a statute which might have affected interstate commerce, but was upheld as to its operation within the State. Another objection to the statute was that it applied to partnerships and unincorporated associations contrary to article 2, section 4, of the Constitution of the United States. The court, however, held that the provisions were separable, and sustained the statute.

In the case of the Employers' Liability Cases, 207 U. S., 463, an act of Congress was under review and certain portions of it were held void. In this case paragraphs 1, 3, and 4 of the syllabus are as follows:

> "In testing the constitutionality of an act of Congress this court confines itself to the power of Congress to pass the act and may not consider any real or imaginary evils arising from its execution.
>
> "An act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the nature of the business at the time of the injury, of necessity includes subjects wholly outside of the power of Congress under the commerce clause of the Constitution.
>
> "The legislative power of Congress over the District of Columbia and the Territories is plenary and does not depend upon the special grants of power, such as the commerce clause of the Constitution."

In El Paso *vs.* Gutierrez, 215 U. S., 87, the same act was under review and its provisions were sustained so far as they

applied to the District of Columbia. Paragraphs 2, 4, and 5 of the syllabus are as follows. (See also pages 96 and 97, citing Hyde *vs.* Southern Railway, 31 App. D. C., 466:)

> "The power of Congress to regulate commerce in the District of Columbia and Territories is plenary and does not depend on the commerce clause, and a statute regulating such commerce necessarily supersedes a territorial statute on the same subject.
>
> "The rule that the court must sustain an act of Congress as constitutional unless there is no doubt as to its unconstitutionality also requires the court to sustain the act in so far as it is possible to sustain it.
>
> "This court did not in its decision of the Employers' Liability Cases, 207 U. S., 463, hold the act of June 11, 1906, c. 3075, 34 Stat., 232, unconstitutional so far as it related to the District of Columbia and the Territories, and expressly refused to interpret the act as applying only to such employees of carriers in the District and Territories as were engaged in interstate commerce."

In the Southwestern Oil Company *vs.* Texas, 217 U. S., 114, the court had under review the statute of Texas imposing taxes upon oil and oil companies. The law imposed taxes upon wholesale dealers of certain articles and did not impose a similar tax on wholesale dealers of other articles. This discrimination, however, was held to be within the power of the State legislature, and the act was sustained. This case contains an interesting and instructive review of some of the taxation cases decided by that court (pp. 122, 123, 124, 125). The principles announced by the court were stated in paragraphs 3, 4, 5, and 6 of the syllabus as follows:

"Whether the severity of penalties for non-compliance with a State statute renders it unconstitutional under the Fourteenth Amendment will not be considered in an action in which the State does not ask for any penalties.

"The Fourteenth Amendment was not intended to cripple the taxing power of the States or to impose upon them any iron rule of taxation.

"This Court will not speculate as to the motive of a State in adopting taxing laws, but assumes—the statute neither upon its face nor by necessary operation suggesting a contrary assumption—that it was adopted in good faith.

"Except as restrained by its own or the Federal Constitution, a State may prescribe any system of taxation it deems best; and it may, without violating the Fourteenth Amendment, classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class.

"An occupation tax on all wholesale dealers in certain specified articles does not on its face deprive wholesale dealers in those articles of their property without due process of law or deny them the equal protection of the law because a similar tax is not imposed on wholesale dealers in other articles, and so held as to the Kennedy Act of Texas of 1905 levying an occupation tax on wholesale dealers in coal and mineral oils."

It is respectfully suggested that no defect appears of a nature sufficiently serious as to justify the annulment of the act *in toto*.

IV.

The Right of Congress to Tax the Inhabitants of the District of Columbia.

The plaintiff in error has filed the supplemental brief in which he questions the right of Congress to impose tax laws upon the inhabitants of the District without first giving those inhabitants the right of representation in Congress.

Under Article 1, section 8, in the Constitution it is provided "that Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square), as made by cession of particular States, and the acceptance of Congress, become the seat of government of the United States." It is a well-said law that the power of taxation is one of the powers of sovereignty. Kirkland *vs.* Hotchkiss, 100 U. S., 491; Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420; Gilman *vs.* Sheboggan, 2 Black, 570; Union P. R. Co. *vs.* Peniston, 18 Wall., 5, and as such has been exercised by Congress over the District of Columbia for more than a century. The Court has decided that local self-government "is not required by any inexorable principle." Met. Railway Co. *vs.* D. C., 132 U. S., 1, 8; and it has been repeatedly held by this Court that the power of exclusive legislation over the District includes the power of taxation. Wilson *vs.* Lambert, 168 U. S., 611; Parsons *vs.* D. C., 670 U. S., 45, 56, and cases cited therein.

To argue that Congress has not the power to tax the District is to argue that it has not "exclusive legislation," which

is to argue, in turn, that the Constitution which grants "exclusive legislation," is itself illegal. Thus the argument takes on the appearance of a *reductio ad absurdum*.

Respectfully submitted,

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Corporation Counsel, District of Columbia,
Attorney for Defendant in Error.

APPENDIX.

Taxation of Personal Property.

Act of July 1, 1902 (32 Stats., 617).

That the assessor of the District of Columbia shall designate three of the members of said permanent board of assistant assessors for the assessment of real estate, who shall constitute and compose the excise board, under the provisions of the act of the Congress approved August fourteenth, eighteen hundred and ninety-four, aforesaid; and the two other members of said permanent board of assistant assessors shall be designated by said assessor to compose a board of personal-tax appraisers, to assess personal property in accordance with the provisions of this section; and all five members of said permanent board of assistant assessors, together with the assessor as chairman, shall constitute the board of equalization and review of real estate assessments and also the board of personal-tax appeals: *Provided,* That the assessor of the District of Columbia shall act as chairman, *ex officio*, of the several boards aforesaid.

That the two members of the permanent board of assistant assessors designated, as aforesaid, by the assessor, to assess personal property, shall, under the direction and supervision of the said assessor, assess personal property in the District of Columbia as follows:

That hereafter the assessor of the District of Columbia, or his successor in office, shall annually cause to be prepared a printed blank schedule of all tangible personal property and all general merchandise or stock in trade, owned or held in trust or otherwise, subject to taxation under the provisions of this section, and of the classes of corporations and companies to be assessed, together with the rate of tax prescribed to which shall be appended an affidavit in blank, setting

forth that the foregoing presents a full and true statement of all such personal property, taxable capital, or other basis of assessment, or either, as the case may be. When said schedule is ready for delivery, notice thereof shall be given by the assessor by advertisement for three successive secular days in one or more of the daily newspapers published in said District, and a copy of said schedule shall be delivered to any citizen applying therefor at the office of the assessor. Every person, association, corporation, firm, or company in said District liable to taxation hereunder, and every association, company, executor, administrator, guardian, or trustee holding personal property in trust liable to taxation hereunder, shall, within thirty days after the last publication of said advertisement, as aforesaid, fill out the proper blanks in said schedule with a full and true statement, as in this section hereinbefore required, and make and sign an affidavit to the truth thereof, as aforesaid, before the assessor or one of the other members of the said board of personal-tax appraisers, and the members of the said board are hereby authorized to administer such and all oaths in connection with their duties as assessor and appraisers without charge, or before any person authorized by law to administer oaths; and the address in the District of Columbia of the person, corporation, or company making affidavit shall in each case be given below his, its, or their signature, and thereupon said board of personal-tax appraisers, or any one of the members thereof, shall assess said property at its fair cash value, and enter the same in the columns upon said blanks provided for that purpose, and the amount thus ascertained shall be entered upon the books for taxation for the fiscal year beginning July first, nineteen hundred and two, and each fiscal year thereafter: *Provided,* That if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee shall fail to make and deliver to the assessor or one of the said appraisers, within thirty days after the date of the last advertisement of the notice hereinbefore required, the

schedule of his or its said personal property, owned, held in trust, or otherwise, as provided for in this section, then the said board of personal-tax appraisers hereinbefore provided for shall without delay, from the best information they can procure, make an assessment against such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, to which they shall add twenty per centum thereof: *Provided further,* That if the said board of personal-tax appraisers be not satisfied as to the correctness of the return of personal property, made by any person, firm, association, corporation, company, administrator, executor, guardian, or trustee, said board may reject said return and said board, or any one of the members thereof, may, from the best information he or they can procure, or by making such an examination of the personal property as may be practicable, assess the same in such amount as may to him or them seem just; and notice of the rejection of the sworn return shall be given to the party interested by leaving the same at the address given in said return, and in all such cases there shall be a right of appeal from the action taken by said appraisers to the board of personal-tax appeals, hereinafter provided for, or to their successors in office, within fifteen days after delivery of said notice of rejection as aforesaid: *And provided, further,* That if any person, firm, association, corporation, company, administrator, executor, guardian, or trustee shall make a false affidavit touching the matters herein provided for, he or they shall be deemed guilty of perjury, and upon conviction thereof shall be subject to the penalties for that offense now provided by section eight hundred and fifty-eight of the Code of the District of Columbia.

Par. 2. On all tangible personal property, assessed at a fair cash value (over and above the exemptions provided in this section), including vessels, ships, boats, tools, implements, horses and other animals, carriages, wagons, and other vehicles, there shall be paid to the collector of taxes of the District of Columbia one and one-half per centum on the

assessed value thereof. Section six of the Act of July first, ninteen hundred and two, "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," is hereby amended by adding, after paragraph two of said section:

Intangible Personal Property.

Act of March 3, 1917 (39 Stats. L., 1004, 1046).

"An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," approved, March 3, 1917 (39 Stat., pt. 1, 1046).

* * * * * * *

"SEC. 11. Section six of the Act of July first, nineteen hundred and two, entitled 'An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes,' is hereby amended by adding, after paragraph two of said section:

"That the moneys and credits, including moneys loaned and invested, bonds and shares of stock (except the stock of banks and other corporations within the District of Columbia the taxation of which banks and corporations is herein provided for) of any person, firm, association, or corporation resident or engaged in business within said District shall be scheduled and appraised in the manner provided by paragraph one of said section six for listing and appraisal of tangible personal property and assessed at their fair cash value and as taxes on said moneys and credits there shall be

paid to the tax collector of said District three-tenths of one per centum of the value thereof: *Provided,* That savings deposits of individuals in a sum not in excess of $500 deposited in banks, trust companies, or building associations, subject to notice of withdrawal and not subject to check, shall be exempt from this tax: *Provided further,* That such tax on moneys and credits shall not apply to bank notes or notes discounted or negotiated by any bank or banking institution, savings institution, or trust company, nor to savings institutions having no capital stock, building associations, firemen's relief associations, secret and beneficial societies, labor unions, and labor union relief associations, nor, to beneficial organizations paying sick or death benefits, or either or both, from funds received from voluntary contributions or assessments upon members of such associations, societies, or unions; nor shall the provisions of this act apply to life or fire insurance companies having no capital stock, nor to the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege, but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed: *And provided further,* That corporations, limited partnerships, and joint-stock associations within said District liable to tax under the laws of said District on earnings or capital stock shall not be required to make any report or pay any further tax under this section on the mortgages, bonds, and other securities owned by them in their own right, but such corporations, partnerships, and associations holding such securities as trustees, executors, administrators, guardians, or in any other manner, shall return and pay the tax imposed by this section upon all securities so held by them as in the case of individuals."

Par. 3. Dealers in general merchandise of every description shall pay to the collector of taxes of the District of Columbia one and one-half per centum on the average stock in trade for the preceding year.

After the passage of this act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year, and establishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, or engaging in the business of common carrier by vessels, ships, or boats (33 Stats., 563), to conduct such business until a sworn statement of the value of such (*ib.*) stock, vessels, ships, and boats (*ib.*) has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied: *Provided*, That this shall not apply to vessels, ships, or boats if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere (*ib.*, 564). The assessor is hereby authorized to reassess said stock whenever in his judgment it has been undervalued. The goods, wares, and merchandise of any person or persons, who shall fail to pay the tax required by this paragraph within three days after beginning business, shall be subject to distraint, and it shall be the duty of the assessor to place bills therefor in the hands of the collector of taxes, who shall seize sufficient of the goods of the delinquent to satisfy said tax: *Provided*, That said owner shall have the right of redemption within thirty days on payment of said tax, to which shall be added a penalty of one per centum, together with the costs of seizure. The collector shall sell such goods as are not redeemed, at public auction, after advertisement for the three days preceding said sale.

Par. 4. Hotel companies and the proprietors of hotels shall pay to the collector of taxes of the District of Columbia one and one-half per centum on the assessed value of their furniture.

Par. 5. Each national bank as the trustee for its stockholders, through its president or cashier, and all other incorporated banks, and trust companies, in the District of Columbia, through their presidents or cashiers, and all gas, elec-

tric lighting, and telephone companies, through their proper officers, shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its or their gross earnings for the preceding year ending the thirtieth day of June, and shall pay to the collector of taxes of the District of Columbia per annum on such gross earnings as follows: Each national bank, and all other incorporated banks, and trust companies, respectively, six per centum; each gas company, five per centum; each electric lighting, and telephone company four per centum. And in addition thereto the real estate owned by each national or other incorporated bank, and each trust, gas, electric lighting and telephone company in the District of Columbia shall be taxed as other real estate in said District: *Provided*, That street railroad companies shall continue to pay the four per centum per annum on their gross receipts and other taxes as provided by existing law (32 Stats., 619); that that part of the proviso in paragraph five, section six, relating to street railroads, shall be construed to mean that all street railroad companies shall pay four per centum per annum on their gross receipts within the District of Columbia and other taxes as provided by existing law (33 Stats., 564), insurance companies shall continue to pay the one and one-half per centum on premium receipts, as provided by section six hundred and fifty of the Code of the District of Columbia. That so much of the act approved October first, eighteen hundred and ninety, entitled "An act to provide for the incorporation of trust, loan, mortgage, and certain other corporations within the District of Columbia" as is inconsistent with the provisions of this section is hereby repealed (32 Stats., 619). That said Washington Market Company shall make affidavit to the board of personal-tax appraisers on or before the first day of August each year as to the amount of its gross earnings for the preceding year ending the thirtieth day of June from the conduit or conduits herein authorized to be laid, and shall pay to the collector of taxes

of the District of Columbia the sum of four per centum per annum on such gross earnings (34 Stats., 93).

Par. 6. All companies, incorporated or otherwise, who guarantee the fidelity of any individual or individuals, such as bonding companies, and all companies who furnish abstracts of titles to real property, or who insure real-estate titles shall pay to the collector of taxes of the District of Columbia one and one-half per centum of their gross receipts in the District of Columbia (33 Stats., 564; 32 Stats., 619).

Par. 7. Savings banks having no capital stock and paying interest to their depositors shall, through their president or cashier, make affidavit to the board of personal-tax appraisers on or before the first day of August in each year as to the amount of their surplus and undivided profits, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the amount of their surplus and undivided profits on the thirtieth day of June preceding (32 Stats., 619). That hereafter, beginning with the fiscal year commencing July first, nineteen hundred and four, incorporated savings banks paying interest to their depositors shall, through their president or cashier, make a report under oath to the board of personal-tax appraisers on or before the first day of August in each year as the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June thirtieth, and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum (33 Stats., 564).

Par. 8. The capital stock of all corporations, other than those herein provided for, organized in the District of Columbia or under the laws of any of the States or Territories of the United States chiefly for the purpose of and transacting business within the District of Columbia, except those exempted by the laws relating to the District of Columbia, shall be appraised in bulk at its fair cash value

by the board of personal-tax appraisers, and the corporation issuing the same shall be liable for the tax thereon according to such value, and shall pay to the collector of taxes of the District of Columbia a sum equal to one and one-half per centum on the assessed valuation thereof; but from the assessed valuation of such capital stock shall first be deducted the value of any and all real estate owned by such corporation in said District, which real estate shall be separately taxed against said corporation: *Provided*, That nothing in this paragraph contained shall be construed to include business companies which, by reason of or in addition to incorporation (*ib.*, 564) receive no special franchise or privilege; but such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed (32 Stats., 619).

Par. 9. Building associations in the District of Columbia shall pay to the collector of taxes of the District of Columbia two per centum per annum on their entire gross earnings for the preceding year ending June thirtieth (33 Stats., 564).

Exemptions of Personal Property.

Par. 10. The following personal property shall be exempt from taxation:

First. The personal property of all library, benevolent, charitable, and scientific institutions incorporated under the laws of the United States or of the District of Columbia and not conducted for private gain (32 Stats., 620).

Second. Libraries, school books, wearing apparel, and all family portraits (33 Stats., 564).

Third. Household and other belongings, not held for sale, to the value of one thousand dollars, owned by the occupant of any dwelling-house or other place of abode, in which such household and other belongings may be located (*ib.*).

Fourth. Household and other belongings not held for sale and owned by any person in the public service temporarily

residing in the District of Columbia who is a citizen of any State or Territory and who is taxed on such personal property in such State or Territory (Sec. 10, D. C., app'n act, Mar. 4, 1913) (37 Stats., 1006).

Par. 11. That said board of assistant assessors hereinbefore provided for, with the assessor of the District of Columbia as chairman, shall compose a board of personal-tax appeals, and as such board of personal-tax appeals shall convene in a room, to be provided therefor by the said assessor, on the first Monday in February of each year and continue in session to and including the second Monday in March of each year (33 Stats., 563), and public notice of the time and place of such meeting shall be given by advertisement for two consecutive secular days in two daily newspapers published in the District of Columbia. It shall be the duty of the board of personal-tax appeals, between the date of convening and to and including the second Monday in March of each year (*ib.*, 563), to hear all appeals made by any person or persons against the assessment made by the board of personal-tax appraisers and to impartially equalize the value of said personal property as a basis for assessment. Any four members of the said board shall constitute a quorum for business, and in the absence of the assessor a temporary chairman shall be selected. They shall be empowered to diminish or increase such assessments as they may believe to have been returned at other than their true value to such amount as, in their opinion, may be the value thereof, and the action of said board in such cases shall be final. Said board of assistant assessors shall also perform such other official duties as may be required of them by the assessor of the District of Columbia: *Provided*, That in case the personal-tax appraisers shall fail to complete any of the duties in this section to be by them performed within the time provided therefor the taxation provided by this section shall not by reason thereof be invalid; but such appraisers shall proceed with all reasonable diligence to complete such

duties, and their acts shall be valid as if performed within the time fixed therefor. If, at any time within any current year, property subject to taxation under the provisions of this section shall have been omitted from assessment, said board of personal-tax appraisers shall immediately proceed to assess the same for the then current year, giving notice in writing to the persons or corporations so assessed, who shall have a right of appeal within ten days from date of said notice.

Par. 12. That when the taxes on personal property due and payable in each year shall not be paid on or before the first day of June, then and in that event the collector of taxes of the District of Columbia, or his deputy, may distrain sufficient goods and chattels found within the District of Columbia and belonging to the person, firm, association, corporation, company, administrator, executor, guardian or trustee charged with such tax to pay the taxes remaining due, under the provisions of this law, from such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, together with the penalty thereon and the costs that may accrue; and for want of such goods and chattels said collector of taxes may levy upon and sell at auction the estate and interest of such person, firm, association, corporation, company, administrator, executor, guardian, or trustee, or any parcel of land in said District; and in the case of the levy on any estate or interest in land the proceedings subsequent to sale thereof shall be the same as now provided by law in the case of sales for arrears of taxes against real estate; and in the case of distraint of personal property or the levy upon real estate as aforesaid the collector of taxes shall immediately proceed to advertise the same by public notice to be posted in the office of said collector and by advertisement, three times within one week, in one or more of the daily newspapers published in said District, stating the time when and the place where such property shall be sold, the last publication to be at least six

days before the date of sale, and if the said taxes and penalty thereon, and the costs and expenses which shall have accrued thereon, shall not be paid before the day fixed for such sale, which shall not be less than ten days after said levy or taking of said property, the collector shall proceed to sell at public auction in his office, to the highest bidder, such property, or so much thereof as may be needed to pay such taxes, penalty, and accrued costs and expenses of such distraint and sale. Said collector shall report in detail, in writing, every distraint and sale of personal property to the Commissioners of the District of Columbia or their successors in office, and his accounts in respect to every such distraint or sale shall forthwith be submitted to the auditor of the District of Columbia and be audited by him. Any surplus resulting from such sale over and above such taxes, costs, and expenses shall be paid into the Treasury, and upon being claimed by the owner or owners of the goods and chattels aforesaid shall be paid to him or them upon the certificate of the collector of taxes stating in full the amount of such excess (32 Stats., 621).

That hereafter when the collector of taxes shall distrain any goods and chattels in order to enforce payment of taxes levied under the aforesaid act, approved July first, nineteen hundred and two, the goods and chattels so seized shall be kept in a safe and convenient place until the day of the sale thereof; and the sale of said goods and chattels shall be at public auction, at such place as the collector of taxes may designate: *Provided, however,* That no such goods and chattels shall be sold upon any bid not sufficient to meet the amount of tax, penalty, and costs; but in case the highest bid therefor is not sufficient to meet the amount of tax, penalty, and costs thereon, said property thereupon shall be bid off by the said collector of taxes in the name of and by the District of Columbia, and the Commissioners of the District of Columbia may sell the same at private sale to satisfy the

tax, penalty, and cost thereafter without further notice (33 Stats., 565).

Par. 13. That all taxes levied under the foregoing provisions of this section shall be due, payable, and collectible at the same time and times as the general tax on real estate in said District, and shall be subject to the same penalties for non-payment thereof until distraint or sale as hereinbefore provided (32 Stats., 621).

Par. 14. That private banks or bankers not incorporated shall pay a tax of five hundred dollars per annum. Every person, firm, company, or association not incorporated having a place of business where credits are opened by the deposit or collection of moneys or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale shall be regarded as a private bank or banker (32 Stats., 621).

Par. 15. General brokers shall pay a tax of two hundred and fifty dollars per annum. Every person, firm, company, or association not incorporated (except insurance and real-estate brokers acting as such) that solicits business from the general public by advertisement or otherwise, and that purchases, sells, or negotiates for others securities, shares, stocks, bonds, exchange, bullion, coin, money, bank notes, or promissory notes, or that deals in futures on market quotations of prices or values on merchandise, shares, stocks, bonds, or other securities, or accepts margins on prices or values of said shares, stocks, bonds, merchandise, or securities, shall be deemed a general broker: *Provided,* That the Washington Stock Exchange, through its president or treasurer, shall pay to the collector of taxes of the District of Columbia a sum equal to five hundred dollars per annum in lieu of tax on the members thereof for business done on said exchange: *And be it further provided,* That if any person or firm shall

have paid the tax in this section provided for banks and bankers, such person or firm shall not again be taxed as a broker or brokers.

Par. 16. Note brokers shall pay a tax of one hundred dollars per annum. Every person, firm, company, or association not incorporated (except private banks and bankers) that loans money on promissory notes without real estate, or collateral security or advances money or personal property as security without possession of said personal property shall be deemed a note broker: *Provided,* That exceptions shall be made of co-operative associations whose business is restricted to the members of such associations.

Par. 17. The taxes for said private banks and bankers, general brokers, and note brokers shall be paid to the collector of taxes of the District of Columbia, and shall date from the first day of July in each year and expire on the thirtieth day of June following. Said taxes shall date from the first day of the month in which the liability begins, and payment shall be made for a proportionate amount.

Par. 18. Any person or persons violating any of the provisions of this section shall be liable to a penalty of not exceeding five hundred dollars for each offense, said penalty to be imposed, upon conviction in the police court of the District of Columbia, as other fines and penalties are imposed, and said court is hereby invested with jurisdiction thereof; and in default of the payment of said penalty the person or persons so convicted shall be imprisoned, in the discretion of the court, not exceeding six months.

Par. 19. That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to appoint a clerk and assistant clerk to said board of personal-tax appraisers at annual salaries of one thousand four hundred and one thousand dollars each, and three inspectors at annual salaries of one thousand two hundred dollars each, all of whom shall perform such duties as may be assigned to them by the chairman of said board; and to pay

the salaries of the two assistant assessors, the clerk and assistand clerk to said board of personal-tax appraisers, and the three inspectors aforesaid for the fiscal year beginning July first, nineteen hundred and two, and six thousand dollars for books, stationery, printing, means of transportation, and other incidental expenses, including the hire of temporary clerks, not to exceed one thousand dollars, the sum of eighteen thousand dollars is hereby appropriated.

Act of April 28, 1904 (33 Stats., 563, 564, 565).

An act to amend the law relating to taxation in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, beginning with the fiscal year commencing July first, nineteen hundred and four, the board of personal-tax appeals of the District of Columbia shall convene on the first Monday in February of each year, and continue in session to and including the second Monday in March of each year, instead of convening on the fifteenth day of November and continuing in session until the fifteenth day of December in each year, as now provided by law.

SEC. 2. That the Act of Congress approved July first, nineteen hundred and two, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes," is hereby amended as follows:

Strike out paragraph three of section six and insert in lieu thereof the following:

"Dealers in general merchandise of every description shall pay to the collector of taxes of the District of Columbia one and one-half per centum on the average stock in trade for the preceding year.

"After the passage of this act it shall be unlawful for any person or persons entering the District of Columbia subsequent to June thirtieth in each year and establishing a place of business for the sale of goods, wares, or merchandise, either at private sale or at auction, or engaging in the business of common carrier by vessels, ships, or boats, to conduct such business until a sworn statement of the value of such stock, vessels, ships, and boats has been filed with the assessor of the District of Columbia, who shall thereupon render a bill for the unexpired portion of the fiscal year at the same rate as other personal taxes are levied: *Provided,* That this shall not apply to vessels, ships, or boats if it shall be made to appear by affidavit that any vessel, ship, or boat has been assessed for taxation and the taxes paid elsewhere.

"The assessor is hereby authorized to reassess said stock whenever in his judgment it has been undervalued. The goods, wares, and merchandise of any person or persons who shall fail to pay the tax required by this paragraph within three days after beginning business shall be subject to distraint, and it shall be the duty of the assessor to place bills therefor in the hands of the collector of taxes, who shall seize sufficient of the goods of the delinquent to satisfy said tax: *Provided,* That said owner shall have the right of redemption within thirty days on payment of said tax, to which shall be added a penalty of one per centum, together with the costs of seizure. The collector shall sell such goods as are not redeemed at public action, after advertisement for the three days preceding said sale."

That that part of the proviso in paragraph five, section six, relating to street railroads "shall be construed to mean that all street railroad companies shall pay four per centum per annum on their gross receipts within the District of Columbia and other taxes as provided by existing law."

Strike out paragraph six of section six and substitute following therefor: "All companies, incorporated or otherwise, who guarantee the fidelity of any individual or individuals,

such as bonding companies, and all companies who furnish abstracts of titles to real property, or who insure real-estate titles, shall pay to the collector of taxes of the District of Columbia one and one-half per centum of their gross receipts in the District of Columbia."

In section six, at the end of paragraph seven, add—

"That hereafter, beginning with the fiscal year commencing July first, nineteen hundred and four, incorporated savings banks paying interest to their depositors shall, through their president or cashier, make report under oath to the board of personal-tax appraisers on or before the first day of August in each year as to the amount of their gross earnings, less the amount paid as interest to their depositors for the preceding year ending June thirtieth, and shall pay thereon to the collector of taxes of the District of Columbia four per centum per annum.

In section six the proviso of paragraph eight is hereby amended so as to read as follows:

"*Provided*, That nothing in this paragraph contained shall be construed to include business companies which, by reason of or in addition to incorporation, receive no special franchise or privilege; but all such corporations shall be rated, assessed, and taxed as individuals conducting business in similar lines are rated, assessed, and taxed."

Section six, paragraph nine, is hereby amended so as to read as follows:

"Building associations in the District of Columbia shall pay to the collector of taxes of the District of Columbia two per centum per annum on their entire gross earnings for the preceding year ending June thirtieth."

In section six the second portion of paragraph ten is hereby amended so as to read as follows:

"Second. Libraries, school books, wearing apparel, and all family portraits."

In section six, at the end of paragraph twelve, add—

"That hereafter when the collector of taxes shall distrain

any goods and chattels in order to enforce payment of taxes levied under the aforesaid act, approved July first, nineteen hundred and two, the goods and chattels so seized shall be kept in a safe and convenient place until the day of the sale thereof; and the sale of said goods and chattels shall be at public auction, at such place as the collector of taxes may designate: *Provided, however,* That no such goods and chattels shall be sold upon any bid not sufficient to meet the amount of tax, penalty, and costs; but in case the highest bid therefor is not sufficient to meet the amount of tax, penalty, and cost thereon, said property thereupon shall be bid off by the said collector of taxes in the name of and by the District of Columbia, and the Commissioners of the District of Columbia may sell the same at private sale to satisfy the tax, penalty, and cost thereafter without further notice."

In section seven, paragraph thirty-eight, at the end thereof, add—

"That hereafter it shall be unlawful for the licensee, owner, proprietor, or any employee of a licensee, owner, or proprietor of any bar-room, or any other establishment in the District of Columbia in which intoxicating liquors of any kind are sold, to sell, give, or dispense in any manner intoxicating liquors of any kind to any person under the age of twenty-one years.

"Any person knowingly violating the provisions of this paragraph shall be amenable to a fine of twenty-five dollars or imprisonment for thirty days, or both, in the discretion of the court; and in addition to such penalty the license for the place in which such intoxicating liquors were sold to a minor shall be revoked."

Section seven, paragraph forty-five, is hereby amended by adding thereto the following:

"That hereafter proprietors of bowling alleys in the District of Columbia shall pay to the collector of taxes of said District an annual license tax of twelve dollars for each alley."

* * * * * * *

SEC. 3. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, April 28, 1904.

Act of March 4, 1913 (37 Stats., 1006).

SEC. 10. That paragraph ten of section six of the act approved July first, nineteen hundred and two, making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes, is hereby amended by adding at the end of said paragraph the following:

Fourth. Household and other belongings not held for sale and owned by any person in the public service temporarily residing in the District of Columbia who is a citizen of any State or Territory and who is taxed on such personal property in such State or Territory."

HEALD, EXECUTOR OF PETERS, *v.* DISTRICT OF COLUMBIA.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 268. Argued April 13, 1922.—Decided May 15, 1922.

1. The objections that the act of Congress taxing the intangible property of persons resident or engaged in business in the District of Columbia, (c. 160, § 9, 39 Stat. 1046), is unconstitutional because of its alleged application to intangible property, credits, etc., of non-residents and to state and municipal bonds, cannot be raised by persons who are residents and whose property taxed is within the District and does not include such bonds. P. 122.
2. Whether a clause of this act respecting the exemption of the stock of certain companies from the tax is void for uncertainty, *held* not open for decision in a suit where it was not shown that any tax was levied on the basis of it or that it subjected the plaintiff to injury or embarrassment. P. 123.
3. Congress has power to tax residents of the District of Columbia for support of the District Government and to cause the money to be paid into the Treasury of the United States and held, not as a separate fund for the District, but subject to the disposal of Congress, notwithstanding the fact that the persons taxed lack the suffrage and have politically no voice in the expenditure of the money. P. 124.

269 Fed. 1015; 50 App. D. C. 231, affirmed.

114. Argument for Plaintiff in Error.

ERROR to a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District for the defendant in an action to recover a tax. See also s. c. *Heald* v. *District of Columbia*, 254 U. S. 20.

Mr. Vernon E. West, with whom *Mr. A. S. Worthington* was on the briefs, for plaintiff in error.

The whole act being void, because it unlawfully taxes nonresidents, plaintiffs in error may question its validity. It would be most remarkable if they and others in a similar position must continue to pay taxes under a void statute until the question of its invalidity is raised by a nonresident. Congress clearly intended that the act should operate alike upon residents and nonresidents engaged in business here.

The court below relied upon *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571; and *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134. But each of those cases relates to the constitutionality of state statutes. This court had before it only the question of constitutionality, and not the question of construction. It was not incumbent upon this court to determine whether the whole act must fall if part was void; provided, there was any possible legal construction by which the state court could separate the good from the bad. The reason for the rule applied by this court in regard to state statutes is fully set forth in *Hatch* v. *Reardon*, 204 U. S. 152, 160. *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, though involving a state statute, is peculiarly analogous to the case at bar. See *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298; *Sully* v. *American National Bank*, 178 U. S. 289.

The law here involved is not a state statute, but an act of Congress relating to the District of Columbia which this court, as well as the courts below, has jurisdiction to

construe. *Smoot* v. *Heyl*, 227 U. S. 518; 12 Corpus Juris, 764; *State* v. *Bengsch*, 170 Mo. 81; *State* v. *Cumberland Club*, 136 Tenn. 84; *People* v. *McBride*, 234 Ill. 146.

In no case has this court refused to hold an act of Congress void on the ground that the party assailing the act was not affected by it in the particular complained of, except in those cases where the provisions of the act were found to be separable. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Employers' Liability Cases*, 207 U. S. 463; *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514; *United States* v. *Reese*, 92 U. S. 214; *Baldwin* v. *Franks*, 120 U. S. 678; *Trade-Mark Cases*, 100 U. S. 82.

The Act of 1917 contains three provisions which are beyond the power of Congress and render the whole act void. (a) The provision taxing nonresidents on intangible property; (b) the provision taxing them on their credits not arising out of their business in the District; and (c) the provision taxing state and municipal bonds.

The provisions of the act as to the tax on "shares of stock" are so vague that it is impossible to determine what shares are taxable and what are exempt; so that so much of the act as relates to them is void. Consequently the whole act falls.

Congress is without power to tax the inhabitants of the District of Columbia or to cause them to be taxed, for local purposes, so long as they are not represented in the taxing body.

It can not be disputed that when the colonies established their independence it was recognized by all of them that not only is taxation without representation tyranny, but that the right to be represented before he can be taxed is a fundamental right, the deprivation of which reduces the injured person or community to a state of slavery. It was deemed to be as important and fundamental as the right of trial by jury. It was, in substance,

the same as the right that private property shall not be taken for public use without just compensation.

These have been the rights of Englishmen for a thousand years. The Declaration of Independence discloses that these are among the rights to maintain which our forefathers drew the sword. And these rights existed to their fullest extent in the residents of Montgomery and Prince George's Counties when a part of each of those counties was transferred to the Federal District of the Constitution. They are today the rights of the inhabitants of this District, unless they have been voluntarily surrendered.

In so far as the cession itself is concerned, there is no room for argument. The act of cession passed by the Maryland legislature expressly provided: "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil or to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States." Tindal's, The City of Washington, 31, 167.

A similar provision was embodied in the Virginia act of cession. Tindal, 32. These acts and the other acts of Virginia and Maryland and the proceedings under which the transfer of the jurisdiction to the United States was completed, are set forth in *Morris* v. *United States*, 174 U. S. 196.

If the residents of the ceded territory lost their right to be represented in any body that imposed taxes on them, they lost it by virtue of some express provision of the Constitution. In the creation of that instrument they were represented by the Virginia and Maryland delegates in the Convention of 1787, and they were represented in the conventions of their respective States when Virginia and Maryland ratified the Constitution.

The express provisions of the Constitution as to taxation are that Congress shall have power to lay and collect

taxes, and uniform duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States throughout the United States; and that no capitation, or other direct, tax, shall be laid, unless in proportion to the census.

We make no question that the people of this District are subject to taxation by Congress under these provisions of the Constitution, as well as under the amendment giving Congress the power to impose an income tax. As to the direct tax provision, it was so held in *Loughborough* v. *Blake*, 5 Wheat. 317. But obviously a different question arises as to taxation for local purposes in the District. That depends upon the proper interpretation of par. 16, § 8, Art. I, of the Constitution, giving Congress power to exercise exclusive legislation over the District and over forts, etc. There seems to be nothing in the recorded proceedings of the Constitutional Convention or in the debates in the Colonial Assemblies when the question of ratifying the Constitution was under discussion that throws any light upon the meaning given by the Convention to the words "exclusive legislation" in this clause of the Constitution. It was adopted without debate. But Madison (Federalist No. XLIII), in explaining the necessity for an independent seat of government, assumes that a State, ceding territory for this purpose, "will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it;" that they "will have had their voice in the election of the government which is to exercise authority over them;" and that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them."

Our claim that the right of Congress to exercise exclusive legislation in this District does not include the power to tax, is sustained by the history of the events which led to the independence of the Colonies and the adoption of the Constitution.

114. Argument for Plaintiff in Error.

The great contention of the Colonists in their controversy with Parliament over the Stamp Act in 1765–6, was that the Parliament's power to legislate for the Colonies did not include the power of internal taxation—that legislation is one thing, and taxation another. 3 Bancroft's History of the United States (Centenary Ed.) pp. 480, 562; 4 History of Debates and Proceedings of Both Houses of Parliament, pp. 288–291; James Otis, Rights of the British Colonies, 3d ed., 1766, p. 55; 3 Hallam's Constitutional History of England (1861 ed.), pp. 34, 35, 36, 105. In every history of these pre-revolutionary times in America it is recorded that the Colonists everywhere resisted the efforts of Parliament to tax them on the principle laid down by their champions in Parliament that taxation is not legislation. When it became evident that the Colonies would resist by force of arms if necessary the enforcement of the Stamp Act, Pitt, in concluding a speech on the subject, advised its repeal, (4 History of Debates and Proceedings in Both Houses of Parliament, p. 297,) which was done, coupled with a resolution declaring that Parliament had the power of legislating for the Colonies in all cases whatsoever. It matters not that those who favored the Stamp Act still held that the words, "in all cases, whatsoever," included the power of taxation. It can not be questioned that Pitt's view was the American view on this subject. It is inconceivable that the people who from 1765 to 1783 were contending for the principle that the power to legislate does not include the power to tax should in 1787 have provided in the constitution they then framed that power to tax without representation should be conferred upon Congress when, as to the proposed federal district, it was given merely the power to legislate.

The contemporaneous construction of the "exclusive legislation" provision of the Constitution, continued for over seventy years, demonstrates that it was not held to

deprive the inhabitants of the District of their right to be represented in any body that should be empowered to tax them.

From the time of the cession till 1871, the inhabitants of the District taxed themselves through their elected representatives, except that in that part of the territory which was not included in the municipal corporations of Washington, Georgetown and Alexandria, they were taxed by what were substantially county commissions composed of justices of the peace appointed by the President. Acts of February 21, 1801, 2 Stat. 103; May 3, 1802, 2 Stat. 193; July 1, 1812, 2 Stat. 771.

From 1871 till 1874, they were taxed by a local legislature, one branch of which was elected by them and the other appointed by the President. Act of February 21, 1871, 16 Stat. 119.

From 1874 till 1878, Congress had under consideration various plans providing for a permanent form of government for the District and meanwhile Congress regulated taxation in the District. Act of June 20, 1874, 17 Stat. 116.

From 1878 till 1920, one-half of the expenses of the District Government were required to be paid out of the revenues of the District produced by laws enacted by Congress and the other one-half by the United States. Act of June 11, 1878, 18 Stat. 102.

Thus, till 1874 the people of the District were fully protected in their right to be represented in the body that taxed them; during the next four years they were waiting for Congress to decide on their form of government; and from that time till 1920 they were amply protected from excessive or unfair taxation by the fact that for every dollar taken from them in taxes the United States was required to appropriate a dollar from its treasury. Acquiescence in such taxation by the inhabitants of the District under these circumstances can not be considered as

binding them to continue to submit when the protection afforded them by the Act of 1878 is withdrawn.

The actual decisions of this court and the courts of the District of Columbia do not uphold the power of Congress to levy local taxes in the District. Distinguishing and explaining: *Loughborough* v. *Blake*, 5 Wheat. 317; *Gibbons* v. *District of Columbia*, 116 U. S. 404; *Welch* v. *Cook*, 97 U. S. 541; *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Cohens* v. *Virginia*, 6 Wheat. 264; *Willard* v. *Presbury*, 14 Wall. 676; *Bauman* v. *Ross*, 167 U. S. 548; *Wilson* v. *Lambert*, 168 U. S. 611; *Parsons* v. *District of Columbia*, 170 U. S. 45.

We are not for a moment claiming that the inhabitants of this District can escape taxation unless they are given representation in Congress. To give us such representation would be the simplest way out; but it is not the only way. It is not taxation that we oppose but taxation without representation. Nor are we claiming that anything like a state government is essential, or even that municipal powers should be given us again. All that is required to make taxation legal in the District is that a body of some kind having the power to regulate taxation here shall be created and that we shall be represented in that body.

Even if the inhabitants of the District of Columbia are not protected by the great principle of the Revolution that "taxation without representation is tyranny," the Intangible Tax Law is invalid because under the statutes which were in force when it was enacted, and which are still in force, all money raised by District taxation is required to be paid into the Treasury of the United States to be used, not for local expenses, but as other Treasury funds are used, for the general expenses of the Government of the United States. See *Binns* v. *United States*, 194 U. S. 486.

Mr. F. H. Stephens for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

To aid in defraying the expenses of the District of Columbia Congress laid a tax of three-tenths of one per cent. on the value of the intangible property of persons resident, or engaged in business, within the District. Act of March 3, 1917, c. 160, § 9, 39 Stat. 1004, 1046. This tax was assessed upon such property held by Heald and others, as committee of Peters, an insane person. They and their ward were residents of the District; the property was located there; and none of it consisted of municipal bonds or was otherwise of a character exempt by law from taxation. The committee, asserting that the taxing act violated the Federal Constitution, paid the tax under protest, and brought this action in the Supreme Court of the District to recover the amount so paid. Judgment was there entered for the defendant. The case was then taken to the Court of Appeals of the District which sought by certificate to obtain from this court instructions as to the constitutionality of the act. The certificate was dismissed for want of jurisdiction. *Heald* v. *District of Columbia*, 254 U. S. 20. Thereupon the case was heard in the Court of Appeals and it affirmed the judgment of the lower court. 50 App. D. C. 231; 269 Fed. 1015. The case is now here on writ of error. Peters having died, his executors, of whom Heald is the survivor, were substituted as plaintiffs in error.

Plaintiff contends that the act is void (*a*) because it requires every non-resident of the District who engages in business therein to pay a tax on all his intangible property wherever situated or from whatever source derived; (*b*) because it requires a non-resident engaged in business within the District to pay a tax on all his credits or choses in action, whether due from residents or non-residents, including those which have not been reduced to concrete form; (*c*) because it taxes bonds of States and their municipalities. The District insists that such is not the

correct construction of the act, that it has not in fact been so construed or applied by the taxing officials, and that, even if it had been, the whole act would not thereby be rendered void, as these provisions are clearly severable from the rest of the act. Compare *Hatch* v. *Reardon*, 204 U. S. 152, 161; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411; *Texas Co.* v. *Brown*, 258 U. S. 466. But these objections, even if otherwise well founded, would not entitle plaintiff to challenge the validity of the tax. The property taxed is located within the District; those who hold it and the owner are residents; and there is no state or municipal bond among the property taxed. It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him.[1] In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held. Compare *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 73; *Straus* v. *Foxworth*, 231 U. S. 162, 171; *Fairchild* v. *Hughes*, 258 U. S. 126.

Then it is contended that one clause of the act is void, because, in enumerating classes of property exempt from the tax on intangibles, it recites "the shares of stock of business companies which by reason of or in addition to incorporation receive no special franchise or privilege." The argument is that the meaning and application of this clause is so uncertain that the taxpayer is left without a guide in making his return. We have no occasion to inquire into the meaning or effect of this provision or

[1] *Supervisors* v. *Stanley*, 105 U. S. 305, 311; *Hatch* v. *Reardon*, 204 U. S. 152, 160; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 453; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544; *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 149.

whether it is open to the criticism leveled against it; for this plaintiff would likewise not be entitled to raise this objection even if well founded; since it is not shown that any tax was levied on the basis of this clause or that it has subjected plaintiff either to injury or to embarrassment.

Finally it is earnestly contended that the act is void, because it subjects the residents of the District to taxation without representation. Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation. Money so raised is paid into the Treasury of the United States, where it is held, not as a separate fund for the District, but subject to the disposal of Congress, like other revenues raised by federal taxation. The objection that the tax is void because of these facts, is fundamental and comprehensive. It is not limited in application to the tax on intangibles, but goes to the validity of all taxation of residents of the District. If sound, it would seem to apply not only to taxes levied upon residents of the District for the support of the government of the District; but also to those taxes which are levied upon them for the support generally of the government of the United States. It is sufficient to say that the objection is not sound. There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation. And the cases are many in which laws levying taxes for the support of the government of the District have been enforced during the period in which its residents have been without the right of suffrage.[1]

Affirmed.

[1] Compare *Gibbons* v. *District of Columbia*, 116 U. S. 404; *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1, 8; *Shoemaker* v. *United States*, 147 U. S. 282; *Bauman* v. *Ross*, 167 U. S. 548; *Wilson* v. *Lambert*, 168 U. S. 611; *Parsons* v. *District of Columbia*, 170 U. S. 45, 50; *District of Columbia* v. *Brooke*, 214 U. S. 138.